ILLINOIS STATUTES

AND

ILLUSTRATIVE CASES

ON

BILLS AND NOTES

TO BE USED IN THE CHICAGO COLLEGE OF LAW, LAW DEPARTMENT OF LAKE FOREST UNIVERSITY, IN CONNECTION WITH NORTON ON BILLS AND NOTES

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CASES REPORTED.

ILLINOIS STATUTES

ON

BILLS AND NOTES.

Hurd's Revised Statutes of Illinois, Chap. 98, p. 1107; 2 Starr & C. Statutes, Chap. 98, p. 2780.

AN ACT to revise the law in relation to promissory notes, bonds, due bills and other instruments in writing. (Approved March 18, 1874. In force July 1, 1874.)

1. (DAMAGES ON FOREIGN BILLS PROTESTED.) Par. 1. Be it enacted by the people of the state of Illinois, represented in the general assembly, that whenever any bill of exchange, drawn or indorsed within this state, and payable without the limits of the United States, is duly protested for non-acceptance or non-payment, the drawer or indorser thereof, due notice being given of such non-acceptance or non-payment, shall pay said bill, with legal interest from the time such bill ought to have been paid, until paid, and ten per cent. damages in addition, together with the costs and charges of protest.

2. (DAMAGES ON DOMESTIC BILLS PROTESTED.) Par. 2. If any bill of exchange drawn upon any person or body politic or corporate, out of this state, but within the United States or their territories, for the payment of money, shall be duly presented for acceptance or payment and protested for non-acceptance or non-payment, the drawer or indorser thereof, due notice being given of such non-acceptance or non-payment, shall pay said bill, with legal interest from the time such bill ought to have been paid, until paid, together with costs and charges of protest, and in case suit has to be brought on such bill of exchange, five per cent. damages in addition.

3. (EFFECT OF NOTES, ETC.) Par. 3. All promissory notes, bonds, due bills and other instruments in writing, made or to be made, by any person, body politic or corporate, whereby such person promises or agrees to pay any sum of money or articles of personal property, or any sum of money in personal property, or acknowledges any sum of money or article of personal property to be due to any other person, shall be taken to be due and payable, and the sum of money or article of personal property therein mentioned shall, by virtue thereof, be due and payable as therein expressed.

4. (NOTES, ETC., ASSIGNABLE BY INDORSEMENT.) Par. 4. Any such note, bond, bill, or other instrument in writing, made payable to any person named as payee therein, shall be assignable, by indorsement thereon, under the hand of such person, and of his assignees, in the same manner as bills of exchange are, so as absolutely to transfer and vest the property thereof in each and every assignee successively.

5. (SUIT BY ASSIGNEE.) Par. 5. Any assignee to whom such sum of money or personal property is, by such indorsement or indorsements, made payable, or in case of the death of such assignee, his executor or administrator, may, in his own name, institute and maintain the same kind of action for the recovery thereof, against the person who made and executed any such note, bond, bill or other instrument in writing, or against his heirs, executors or administrators, as might have been maintained against him by the obligee or payee, in case the same had not been assigned; and in every such action, in which judgment shall be given for the plaintiff, he shall recover his damages and costs of suit, as in other cases.

6. (PAYMENT AFTER NOTICE OF ASSIGNMENT.) Par. 6. No maker of any such note, bond, bill, or other instrument in writing, or other person liable thereon, shall be allowed to allege payment to the payee, made after notice of assignment, as a defense against the assignee.

7. (RIGHTS OF HOLDERS—LIABILITY OF ASSIGNOR.) Par. 1. The rights of the lawful holders of promissory notes payable in money and the liability of all parties to or upon said notes shall be the same as that of like parties to inland bills of exchange according to the custom of merchants. Every assignor of every other note, bond, bill or other instrument in writing mentioned in section III of this act shall be liable to the action of the assignee or lawful holder thereof, if such assignee or lawful holder shall have used due diligence by the institution and prosecution of a suit against the maker thereof, for the recovery of the money or property due thereon, or damages in lieu thereof. But if the institution of such suit would have been unavailing, or the maker had absconded or resided without or had left the state when such instrument became due, such assignee or holder may recover

against the assignor as if due diligence by suit had been used.

7a. (ALL PERSONS LIABLE MAY BE SUED IN ONE ACTION.) Par. 2. Persons severally liable upon bills of exchange or promissory notes, payable in money, may all or any of them severally be included in the same suit at the option of the plaintiff, and judgment rendered in said suit shall be without prejudice to the rights of the several defendants as between themselves.

7b. (HOW JUDGMENT SHALL BE ENTERED.) Par. 3. In any suit mentioned in the preceding section a separate judgment may be entered by default against any defendant or defendants severally liable who have been duly served with summons, and against whom the plaintiff would have been entitled to judgment had the suit been against such defendant or defendants only. The suit shall thereby be severed, and shall proceed to trial against the other party or parties in the same manner as if it had been commenced against such other party or parties only, and if the plaintiff recover, judgment shall be entered against such one or more of the defendants as are found liable to him, but in no event shall the plaintiff be entitled to more than one satisfaction.

7c. (WHEN DRAWER OR ENDORSER PAYS JUDGMENT—PROCEEDINGS AS TO OTHERS.) Par. 4. Whenever the drawer or endorser of an accepted bill or exchange or the endorser or guarantor of a promissory note shall have been joined with the acceptor of said bill or the maker of said note in a suit to enforce the collection thereof, and judgment has been recovered against any such drawer, endorser or guarantor who shall thereafter pay the same, the person so paying shall be entitled to have the judgment released as to him, but the same shall, at his option, stand and may be enforced by execution under the order of the court against any other party thereto who remains liable to the party paying as upon said bill or note, for the reimbursement of the party so paying. If there be any contest as to such liability the court may order an issue to be made up between the contesting parties, which shall be summarily determined as the court may direct.

7d. (PROCEEDINGS WHEN ALL THE DEFENDANTS HAVE NOT BEEN SERVED.) Par. 5. In all suits on negotiable instruments where any of the defendants are jointly liable, and only one or more, but not all of them have been served with summons, if the plaintiff recover, judgment shall be entered in form against all the defendants so jointly liable, but so far only as that it may be enforced against the joint property of all and the separate property of the defendants served.

8. (NOTES, ETC., PAYABLE TO BEARER.) Par. 8. Any note, bond, bill or other instrument in writing, made payable to bearer, may be transferred by delivery thereof, and an action may be maintained thereon in the name of the holder thereof. Every indorser of any instrument mentioned in this section shall be held as a guarantor of payment unless otherwise expressed in the indorsement.

9. (FAILURE OF CONSIDERATION.) Par. 9. In any action upon a note, bond, bill, or other instrument in writing, for the payment of money or property, or the performance of covenants or conditions, if such instrument was made or entered into without a good and valuable consideration, or if the consideration upon which it was made or entered into has wholly or in part failed, it shall be lawful for the defendant to plead such want of consideration, or that the consideration has wholly or in part failed; and if it shall appear that such instrument was made or entered into without a good or valuable consideration, or that the consideration has wholly failed, the verdict shall be for the defendant; and if it shall appear that the consideration has failed in part, the plaintiff shall recover according to the equity of the case: provided, that nothing in this section contained shall be construed to affect or impair the right of any bona fide assignee of any instrument made assignable by this act, when such assignment was made before such instrument became due.

10. (FRAUD.) Par. 10. If any fraud or circumvention be used in obtaining the making or executing of any of the instruments aforesaid, such fraud or circumvention may be pleaded in bar to any action to be brought on any such instrument so obtained, whether such action be brought by the party committing such fraud or circumvention, or any assignee of such instrument.

11. (DEFENSE.) Par. 11. If any such note, bond, bill or other instrument in writing shall be indorsed after the same becomes due, and any indorsee shall institute an action thereon against the maker of the same, the defendant being maker shall be allowed to set up the same defense that he might have done had the action been instituted in the name and for the use of the person to whom such instrument was originally made payable, or any intermediate holder.

12. (SET-OFF.) Par. 12. In any action upon a note, bond, bill, or other instrument in writing, which has been assigned to or transferred by delivery to the plaintiff after it became due, a set-off to the amount of the plaintiff's debt may be made of a demand existing against any person or persons who shall have assigned or transferred such instrument after it became due, if the demand be such as might have been set-off against the assignor, while the note or bill belonged to him.

13. (PAYMENTS BEFORE ASSIGNMENT.) Par. 13. If any such note, bond, bill, or other instrument of writing, shall be assigned before the day the money or property therein mention-

ed becomes due and payable, and the assignee shall institute an action thereon, the defendant may give in evidence at the trial any money or property actually paid on the said note, bond, bill, or other instrument in writing, before the said note, bond, bill, or other instrument in writing was assigned to the plaintiff, on proving that the plaintiff had sufficient notice of the said payment before he accepted or received such assignment.

14. (LOST INSTRUMENTS.) Par. 14. In any action founded upon any note, bond, bill, or other instrument in writing, or in which the same, if produced, might be allowed as a set-off in defense, if it shall appear that such instrument was lost while belonging to the party claiming the amount due thereon, to entitle him to recover upon or set-off the same, he may, in the discretion of the court, be required to execute a bond to the adverse party in a penalty at least double the amount of such note, bill or instrument, with sufficient security, to be approved by the court in which the action is pending, conditioned to indemnify the adverse party, his heirs, executors and administrators, against all claims by any other person on account of such instrument, and against all cost and expenses by reason thereof.

15. (DAYS OF GRACE.) Par. 15. No promissory note, cheque, draft, bill of exchange, order or other negotiable or commercial instrument, shall be entitled to days of grace, but shall be absolutely payable at maturity. (As amended by act approved June 4, 1895. In force July 1, 1895.)

16. (TIME.) Par. 16. In all computations of time, and of interest and discounts, a month shall be considered to mean a calendar month, and a year shall consist of twelve calendar months; and in computations of interest or discounts for any number of days less than a month, a day shall be considered a thirtieth part of a month, and interest or discounts shall be computed for such fractional parts of a month upon the ratio which such number of days shall bear to thirty.

17. (HOLIDAYS—MATURITY OF NEGOTIABLE PAPER.) Par. 17. The following days, to-wit: The first day of January, commonly called New Years Day, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the twenty-fifth day of December, commonly called Christmas Day, the first Monday in September, to be known as Labor Day, the twelfth day of February and any day appointed or recommended by the governor of this state or by the president of the United States, as a day of fast or thanksgiving, are hereby declared to be legal holidays, and shall for all purposes whatsoever as regards the presenting for payment or acceptance, the maturity and protesting and giving notice of the dishonor of bills of exchange, bank checks and promissory notes or other negotiable or commercial paper or instruments be treated and considered as is the first day of the week, commonly called Sunday. When any such holidays fall upon Sunday, the Monday next following shall be held and considered such holiday. All notes, bills, drafts, checks or other evidence of indebtedness, falling due or maturing on either of said days, shall be deemed as due or maturing on the day following, and when two (2) or more of these days come together, or immediately succeeding each other, then such instruments, paper or indebtedness shall be deemed as due or having matured on the day following the last of such days. (As amended by act approved June 4, 1895. In force July 1, 1895.)

DEBTS CONTRACTED FOR LABOR PAYABLE IN BANKABLE CURRENCY.

AN ACT to prevent extortion and compel the payment of debts contracted for labor in bankable currency. (Approved June 21, 1895. In force July 1, 1895.)

18. (CHECK, ETC., FOR LABOR PAYABLE IN BANKABLE CURRENCY.) Par. 1. Be it enacted by the people of the state of Illinois, represented in the general assembly, that any time check or store order, issued or given as compensation for labor performed, shall be redeemable at the option of the person to whom the same was issued or given, or upon his written order, in bankable currency. Any person who violates this act shall be deemed guilty of a misdemeanor, and shall be punished by a fine not to exceed one hundred (100) dollars or confined in the county jail not to exceed thirty (30) days, or both, in the discretion of the court.

ILLUSTRATIVE CASES

ON

BILLS AND NOTES.

GOODWIN v. ROBARTS et al.

(L. R. 10 Exch. 337.)

Court of Exchequer. July 7, 1875.

Error by the defendants on a judgment of the court of exchequer in favor of the plaintiff.

The material facts are stated in the opinion of the court.

Mr. Batten, for plaintiff in error. Mr. Mackenzie, for defendants in error.

COCKBURN, C. J. The question for our decision in this case is whether certain scrip issued by the authority of the Russian government, and certain other scrip issued by the authority of the Austro-Hungarian government, is a negotiable security, for money, so that the transfer of it by a person not being the true owner to a bona fide holder, for value, can confer a good title on the latter. The scrip in question was bought by the plaintiff through one Clayton, a stockbroker, and was allowed to remain in Clayton's hands, who unlawfully pledged it with the defendants, who are bankers, as security for a loan of money. Clayton having become bankrupt and having absconded, the defendants sold the scrip at the market price of the day, and the plaintiff brings his action to recover the amount realized on such sale.

The scrip in question was in the following form:—"1873. C. 1873. Imperial Government of Russia. Issue of £15,000,000 sterling nominal capital in 5 per cent. consolidated bonds of 1873. Negotiated by Messrs. N. M. Rothschild & Sons, London, and Messrs. De Rothschild Brothers, Paris. Bearing interest half-yearly, payable in London from 1st of December, 1873. Scrip for one hundred pounds stock, No. ——. Received the sum of twenty pounds, being the first instalment of 20 per cent. upon one hundred pounds stock, and on payment of the remaining instalments at the period specified, the bearer will be entitled to receive a definitive bond or bonds for one hundred pounds after receipt thereof from the imperial government. London, 1st December, 1873. The instalments are to be paid at our office as follows: £15 per cent., or £15, on the 5th February, 1874; £15 per cent., or £15, on the 9th of March, 1874; £20 per cent., or £20, on the 2nd May, 1874; £23 per cent., or £23, on the 9th June, 1874. Subscribers may pass the same under a discount at 3 per cent. per annum, on any Monday or Thursday after the 16th instant. In default of payment of these instalments at the proper dates, all previous payments will be liable to forfeiture." Then follow four other receipts for £20 each, making up the £100, for which the bond is afterwards to be given.

The scrip issued by the authority of the Austro-Hungarian government was in a precisely similar form. The scrip in question was issued by Messrs. De Rothschild as the agents of the Russian and Austro-Hungarian governments, they being employed by these governments to negotiate and raise a loan for them respectively on government bonds, bearing interest, to be afterwards issued in exchange for the scrip when all the instalments of the sum for which the scrip was issued should have been paid up. No question is raised as to the fact of Messrs. De Rothschild having acted in the manner as agents of the two governments, or of the scrip having been issued by the authority of the latter. The bonds issued on the last instalment being paid up were, as will be seen on reference to the special case in which they are set out, in conformity with the terms stated in the scrip. It is only necessary to point out that the bond, agreeably to the terms of the scrip, is made payable to bearer.

The 9th paragraph of the special case contains the following statement, upon which, as it appears to us, the decision of the case turns: "The scrip of loans to foreign governments, entitling the bearer thereof to bonds for the same amount when issued by the government, has been well known to and largely dealt in by bankers, money dealers, and the members of the English and foreign stock exchanges, and through them by the public, for over fifty years. It is and has been the usage of such bankers, money dealers, and stock exchanges, during all that time, to buy and sell such scrip and to advance loans of money upon the security of it before the bonds were issued, and to pass the scrip upon such dealing by mere delivery as a negotiable instrument transferable by delivery, and this usage has always been recognized by the foreign governments or their agents delivering the bonds when issued to the bearers of the scrip. This usage extended alike to scrip issued by their agents in England, and it extended to the scrip now in question, which was largely dealt in as above mentioned. Such scrip often passes through the hands of several buyers and dealers in succession before the issue of the bonds represented by it." L. R. 10 Exch. 79.

The contention on the part of the plaintiff was that, scrip of this description not coming under the category of any of the securities for money which, by the law merchant, are capable of being transferred by indorsement or delivery,—indeed, not being a security for money at all, but only for the future delivery of a bond,—the right of the true owner could not be divested by the fraudulent transfer of the chattel by a person who had no title as against the owner.

On the part of the defendants it was contended that the finding as to general usage brought the case within the decisions in Gorgier v. Mieville, 3 Barn. & C. 45, and Attorney General v. Bouwens, 4 Mees. & W. 171. In the former of these cases a bond of the king of Prussia, payable "to every person who should for the time being be the holder of the bond," had been, as in the present in-

stance, unlawfully pledged with the defendants in the action by an agent who had been intrusted with it for the purpose of receiving the interest on it. The owner having brought an action to recover the bond, it was proved on the trial that bonds of this description were sold in the market, and passed from hand to hand daily, like exchequer bills, at a variable price according to the state of the market. Upon these facts Lord Chief Justice Abbott was clearly of opinion that this bond might be pledged to any person who did not know that the person pledging it was not the real owner, and he directed the jury to find a verdict for the defendants, unless they thought that the defendants knew that Messrs. Agassiz & Co., the pledgors, were not the owners of the bond at the time when they deposited it in their hands. A rule nisi for a new trial, having been obtained, was afterwards discharged. Abbott, C. J., giving judgment says: "This instrument in its form is an acknowledgment by the king of Prussia that the sum mentioned in the bond is due to every person who shall for the time being be the holder of it; and the principal and interest is payable in a certain mode and at certain periods mentioned in the bond. It is, therefore, in its nature precisely analogous to a banker's note payable to bearer, or to a bill of exchange indorsed in blank. Being an instrument, therefore, of the same description, it must be subject to the same rule of law, that whoever is the holder of it has power to give title to any person honestly acquiring it. It is distinguishable from the case of Glyn v. Baker, 13 East, 509, because there it did not appear that India bonds were negotiable, and no other person could have sued on them but the obligee. Here, on the contrary, the bond is payable to the bearer, and it was proved at the trial that bonds of this description were negotiated like exchequer bills." In Attorney General v. Bouwens, 4 Mees. & W. 171, the question as to the negotiable character of foreign bonds arose in a different form, the question being whether Russia, Danish, and Dutch bonds, of which a testator dying in this country was holder at the time of his death, were liable to probate duty. In a special verdict taken at the trial it was expressly found "that the said Russian, Danish and Dutch bonds, respectively were and are, and always have been, marketable securities within this kingdom, and always have been sold and transferred within this kingdom by delivery only, and the bearers thereof have always been deemed and reputed to be, and have always been dealt with as being, legally entitled to the principal moneys secured by the said bonds respectively, and to the interest or dividends from time to time arising or accruing in respect of the same. It never has been nor is it necessary to do or perform any act whatsoever out of the kingdom of England, in order to render a transfer of any of the said bonds valid, and the bearers of the said bonds, respectively, have always been treated and dealt with by the agents of the empire of Russia, and of the kingdom of Holland and Denmark, as the persons duly entitled to the principal moneys secured by the said bonds respectively, and the interest or dividends thereof, and such agents have always paid all moneys due and payable for and in respect of the said bonds respectively, according to the tenor and effect thereof to the bearers of the same." In like manner, in Heseltine v. Siggers, 1 Exch. 856, 18 Law J. Exch. 166, Spanish bonds were treated as passing by mere delivery.

Strenuous efforts were made by Mr. Benjamin in his able argument on behalf of the plaintiff to distinguish the present case from Gorgier v. Mieville, 3 Barn. & C. 45. He insisted, first, that although it must be admitted that if a bond had been given in lieu of this scrip, the bond would have been a negotiable instrument, as the case would then have come within Gorgier v. Mieville, 3 Barn. & C. 45, here there was no engagement on the part of the foreign government. The only party signing the scrip or who could be held bound by it were the Messrs. De Rothschild; and the persons advancing their money, and taking the scrip could look only to them. Secondly, that even assuming that the issuing of the scrip was to be taken to be the act of the foreign government, yet that as it had been issued in London, and the parties taking it had advanced their money in this country, the contract must be taken to have been made here, and must be subject to the law of England. That when a foreign sovereign negotiated a loan in this country, through his agent, it was in effect the same thing as though such sovereign had himself come to this country and entered into the contract in person. That, consequently, in either view, the contract arising on the scrip must be taken to have been made here and must be dealt with according to English law. That this being so, the case of Crouch v. Credit Foncier of England, L. R. 8 Q. B. 374, was an authority which established that it was not competent to anyone by the law of England, to give to a security, not negotiable by the law merchant, the character of negotiability, by making it payable to bearer, even though such security were security for money. That, a fortiori, this scrip, not being a promise to pay money, but only to give a bond when all the instalments should have been paid up, could not have the character of negotiability given to it by being made payable to bearer. That choses in action not being assignable by the general common law, it was only by the law merchant which was recognized by the common law and adopted by it that a particular class of securities for money could be made negotiable, either by indorsement, or, by being made payable to bearer; and that this class of securities was confined to bills of exchange, promissory notes, and drafts payable to bearer. That this scrip did not coincide with either of the securities for money to which by

the law merchant the quality of being so rendered negotiable had been conceded; the more so as in fact it was not a security for money at all, but only an agreement to give such a security in the shape of a bond. That the bonds of foreign governments had been held to be negotiable by the courts of this country, not because they were negotiable by the law of the country in which they were made, but because they were in substance and effect promissory notes.

We entirely dissent from the contention that the contract in question is one in which the Messrs. De Rothschild can be looked upon as principals. And though our decision on that head may not be essential to the conclusion we have arrived at on the case, we think it desirable in a matter in which the public are so much interested that our view should be made known. It is plain on the face of the document that the Messrs. De Rothschild only profess to be acting as the agents of the foreign governments. The law on this subject is correctly laid down in Story on Agency, in the chapter on the Liabilities of Public Agents (section 302). Collecting the English and American authorities in a note, the learned jurist writes as follows: "In the ordinary course of things, an agent contracting on behalf of the government, or of the public, is not personally bound by such a contract, even though he would be by the terms of the contract, if it were an agency of a private nature. The reason of the distinction is, that it is not to be presumed, either that the public agent means to bind himself personally in acting as a functionary of the government, or that the party dealing with him in his public character, means to rely on his individual responsibility. On the contrary, the natural presumption in such cases is that the contract was made upon the credit and responsibility of the government itself, as possessing an entire ability to fulfil all its just contracts, far beyond that of any private man, and that it is ready to fulfil them not only with good faith, but with punctilious promptitude, and in a spirit of liberal courtesy. Great public inconvenience would result from a different doctrine, considering the various public functionaries which the government must employ in order to transact its ordinary business and operations; and many persons would be deterred from accepting of many offices of trust under the government, if they were held personally liable upon all their official contracts. This principle not only applies to simple contracts, both parol and written, but also to instruments under seal, which are executed by agents of the government in their own name, and purport to be made by them on behalf of the government; for the like presumption prevails in such cases, that the parties contract not personally, but merely officially within the sphere of their appropriate duties."

Chancellor Kent lays down the law to the like effect (2 Comm., 7th Ed., p. 810): "There is a distinction in the books between public and private agents on the point of personal responsibility. If an agent, on behalf of the government, makes a contract and describes himself as such, he is not personally bound, even though the terms of the contract be such as might, in a case of a private nature, involve him in a personal obligation. The reason of the distinction is, that it is not to be presumed that a public agent meant to bind himself individually for the government, and the party who deals with him in that character is justly supposed to rely upon the good faith and undoubted ability of the government. But the agent in behalf of the public may still bind himself by an express engagement, and the distinction terminates in a question of evidence. The inquiry in all cases is, to whom was the credit, in the contemplation of the parties, intended to be given. This is the general inference to be drawn from all the cases, and it is expressly declared in some of them."

It is true these authors are speaking of persons acting as agents for their own governments; but the reasoning applies equally to persons acting as agents for a foreign government, and the same presumption must arise in both cases. Nor can we suppose that the persons taking this scrip did so otherwise than through their faith in the honour of the foreign government, just as they would have had to trust to it on their afterwards receiving the bonds in lieu of the scrip. They would then be equally without legal redress against the foreign government, and must have trusted to its honour in the fulfilment of its engagement.

We think it unnecessary to enter upon the question whether the contract thus entered into is to be considered as a Russian or as an English contract, as we agree in thinking that its negotiable character, if it exists at all, must depend not on what might be its negotiability by the foreign law, but on how far the universal usage of the monetary world has given it that character here. "The question," says Tindal, C. J., in Lang v. Smith, 7 Bing. 284, at page 293, "is not so much what is the usage in the country whence the instrument comes as in the country where it passed." The substance of Mr. Benjamin's argument is that, because the scrip does not correspond with any of the forms of the securities for money which have been hitherto held to be negotiable by the law merchant, and does not contain a direct promise to pay money, but only a promise to give security for money, it is not a security to which, by the law merchant, the character of negotiability can attach. Having given the fullest consideration to this argument, we are of opinion that it cannot prevail. It is founded on the view that the law merchant thus referred to is fixed and stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of com-

merce. It is true that the law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, and, as it were, coeval with it. But, as a matter of legal history, this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the lex mercatoria, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law, with a view to the interests of trade and the public convenience, the court proceeding herein on the well-known principle of law that, with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law, and may thus be said to form part of it. "When a general usage has been judicially ascertained and established," says Lord Campbell, in Brandao v. Barnett, 12 Clark & F., at page 805, "it becomes a part of the law merchant, which courts of justice are bound to know and recognize."

Bills of exchange are known to be of comparatively modern origin, having been first brought into use, so far as is at present known, by the Florentines in the twelfth, and by the Venetians about the thirteenth, century. The use of them gradually found its way into France, and, still later, and but slowly, into England. We find it stated in a law tract by Mr. Macleod, entitled "Specimen of a Digest of the Law of Bills of Exchange," printed, we believe, as a report to the government, but which, from its research and ability, deserves to be produced in a form calculated to insure a wider circulation, that Richard Malynes, a London merchant, who published a work called the "Lex Mercatoria," in 1622, and who gives a full account of these bills as used by the merchants of Amsterdam, Hamburg, and other places, expressly states that such bills were not used in England. There is reason to think, however, that this is a mistake. Mr. Macleod shews that promissory notes, payable to bearer, or to a man and his assigns, were known in the time of Edward IV. Indeed, as early as the statute of 3 Rich II., c. 3, bills of exchange are referred to as a means of conveying money out of the realm, though not as a process in use among English merchants. But the fact that a London merchant, writing expressly on the law merchant, was unaware of the use of the bills of exchange in this country, shews that that use at the time he wrote must have been limited. According to Professor Story, who herein is, no doubt, perfectly right, "the introduction and use of bills of exchange in England," as indeed it was everywhere else, "seems to have been founded on the mere practice of merchants, and gradually to have acquired the force of a custom." With the development of English commerce the use of these most convenient instruments of commercial traffic would, of course, increase; yet, according to Mr. Chitty, the earliest case on the subject to be found in the English books is that of Martin v. Boure, Cro. Jac. 6, in the first James I. Up to this time the practice of making these bills negotiable by indorsement had been unknown, and the earlier bills are found to be made payable to a man and his assigns, though in some instances to bearer. But about this period—that is to say, at the close of the sixteenth or the commencement of the seventeenth century—the practice of making bills payable to order, and transferring them by indorsement, took its rise. Hartmann, in a very learned work on Bills of Exchange, recently published in Germany, states that the first known mention of the indorsement of these instruments occurs in the Neapolitan Pragmatica of 1607. Slavery, cited by Mons. Nougnier, in his work "Des Lettres de Change," had assigned to it a later date, namely, 1620. From its obvious convenience this practice speedily came into general use, and, as part of the general custom of merchants, received the sanction of our courts. At first the use of bills of exchange seem to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons, whether traders or not. See Chit. Bills (8th Ed.) p. 13. In the meantime, promissory notes had also come into use, differing herein from bills of exchange: that they were not drawn upon a third party, but contained a simple promise to pay by the maker, resting, therefore, upon the security of the maker alone. They were at first made payable to bearer, but when the practice of making bills of exchange payable to order, and making them transferable by indorsement, had once become established, the practice of making promissory notes payable to order, and of transferring them by indorsement, as had been done with bills of exchange, speedily prevailed. And for some time the courts of law acted upon the usage with reference to promissory notes, as well as with reference to bills of exchange. In 1680, in the case of Shelden v. Hentley, 2 Show. 160, an action was brought on a note under seal by which the defendant promised to pay to bearer £100, and it was objected that the note was void because not payable to a specific person. But it was said by the court: "Traditio facit chartam loqui, and by the delivery he (the maker) expounds the person before meant; as when a merchant promises to pay to the bearer of the note, anyone

that brings the note shall be paid." Jones, J., said that "it was the custom of merchants that made that good." In Bromwich v. Loyd, 2 Lutw. 1582, the plaintiff declared upon the custom of merchants in London on a note for money payable on demand, and recovered; and Treby, C. J., said that "bills of exchange were originally between foreigners and merchants trading with the English. Afterwards, when such bills came to be more frequent, then they were allowed between merchants trading in England, and afterwards between any traders whatsoever, and now between any persons, whether trading or not; and therefore the plaintiff need not allege any custom, for now those bills were of that general use that upon an indebitatus assumpsit they may be given in evidence upon the trial." To which Powell, J., added: "On indebitatus assumpsit for money received to the use of the plaintiff the bill may be left to the jury to determine whether it was given for value received." In Williams v. Williams, Carth. 269, where the plaintiff brought his action as indorsee against the payee and indorser of a promissory note, declaring on the custom of merchants, it was objected on error that, the note having been made in London, the custom, if any, should have been laid as the custom of London. It was answered "that this custom of merchants was part of the common law, and the court would take notice of it ex officio; and therefore it was needless to set forth the custom specially in the declaration, but it was sufficient to say that such a person 'secundum usum et consuetudinem mercatorum,' drew the bill." And the plaintiff had judgment.

Thus far the practice of merchants, traders, and others of treating promissory notes, whether payable to order or bearer, on the same footing as bills of exchange, had received the sanction of the courts, but, Holt having become chief justice, a somewhat unseemly conflict arose between him and the merchants as to the negotiability of promissory notes, whether payable to order or to bearer; the chief justice taking what must now be admitted to have been a narrow-minded view of the matter, setting his face strongly against the negotiability of these instruments, contrary, as we are told by authority, to the opinion of Westminster Hall, and in a series of successive cases persisting in holding them not to be negotiable by indorsement or delivery. The inconvenience to trade arising therefrom led to the passing of the statute of 3 & 4 Anne, c. 9, whereby promissory notes were made capable of being assigned by indorsement or made payable to bearer, and such assignment was thus rendered valid beyond dispute or difficulty. It is obvious from the preamble of the statute, which merely recites that "it had been held that such notes were not within the custom of merchants," that these decisions were not acceptable to the profession or the country. Nor can there be much doubt that by the usage prevalent amongst merchants these notes had been treated as securities negotiable by the customary method of assignment, as much as bills of exchange, properly so called. The statute of Anne may, indeed, practically speaking, be looked upon as a declaratory statute, confirming the decisions prior to the time of Lord Holt.

We now arrive at an epoch when a new form of security for money, namely, goldsmiths' or bankers' notes, came into general use. Holding them to be part of the currency of the country as cash, Lord Mansfield and the court of king's bench had no difficulty in holding, in Miller v. Race, 1 Burrows, 452, that the property in such a note passes, like that in cash, by delivery, and that a party taking it bona fide, and for value, is consequently entitled to hold it against a former owner from whom it has been stolen. In like manner it was held, in Collins v. Martin, 1 Bos. & P. 648, that where bills indorsed in blank had been deposited with a banker, to be received when due, and the latter had pledged them with another banker as security for a loan, the owner could not bring trover to recover them from the holder. Both these decisions of course proceeded on the ground that the property in the bank note payable to bearer passed by delivery, that in the bill of exchange by indorsement in blank, provided the acquisition had been made bona fide. A similar question arose in Wookey v. Pole, 4 Barn. & Ald. 1, in respect of an exchequer bill, notoriously a security of modern growth. These securities being made in favor of blank or order, contained this clause, "If the blank is not filled up, the bill will be paid to bearer." Such an exchequer bill, having been placed, without the blank being filled up, in the hands of the plaintiff's agent, had been deposited by him with the defendants, on a bona fide advance of money. It was held by three judges of the queen's bench—Bayley, J., dissentiente—that an exchequer bill was a negotiable security, and judgment was therefore given for the defendants. The judgment of Holroyd, J., goes fully into the subject, pointing out the distinction between money and instruments which are the representatives of money and other forms of property. "The courts," he says, "have considered these instruments either promises or orders for the payment of money, or instruments entitling the holder to a sum of money, as being appendages to money, and following the nature of their principal." After referring to the authorities, he proceeds: "These authorities shew that not only money itself may pass, and the right to it may arise, by currency alone, but, further, that these mercantile instruments, which entitle the bearer of them to money, may also pass, and the right to them may arise, in like manner, by currency or delivery. These decisions proceed upon the nature of the property (i. e. money) to which such instruments

give the right, and which is in itself current, and the effect of the instruments, which either give to their holders, merely as such, a right to receive the money, or specify them as the persons entitled to receive it." Another very remarkable instance of the efficacy of usage is to be found in much more recent times. It is notorious that, with the exception of the Bank of England, the system of banking has recently undergone an entire change. Instead of the banker issuing his own notes in return for the money of the customer deposited with him, he gives credit in account to the depositor, and leaves it to the latter to draw upon him, to bearer or order, by what is now called a "cheque." Upon this state of things the general course of dealing between bankers and their customers has attached incidents previously unknown, and these, by the decisions of the courts, have become fixed law. Thus, while an ordinary drawee, although in possession of funds of the drawer, is not bound to accept, unless by his own agreement or consent, the banker, if he has funds, is bound to pay on presentation of a cheque on demand. Even admission of funds is not sufficient to bind an ordinary drawee, while it is sufficient with a banker; and the money deposited with a banker is not only money lent, but the banker is bound to repay it when called for by the draft of the customer. See Pott v. Clegg, 16 Mees. & W. 321. Besides this, a custom has grown up among bankers themselves of marking cheques as good for the purposes of clearance by which they become bound to one another. Though not immediately to the present purpose, bills of lading may also be referred to as an instance of how general mercantile usage may give effect to a writing which without it would not have had that effect at common law. It is from mercantile usage, as proved in evidence, and ratified by judicial decision in the great case of Lickbarrow v. Mason, 2 Term R. 63, that the efficacy of bills of lading to pass the property in goods is derived.

It thus appears that all these instruments which are said to have derived their negotiability from the law merchant had their origin, and that at no very remote period, in mercantile usage, and were adopted into the law by our courts as being in conformity with the usages of trade; of which, if it were needed, a further confirmation might be found in the fact that, according to the old form of declaring on bills of exchange, the declaration always was founded on the custom of merchants.

Usages, adopted by the courts, having been thus the origin of the whole of the so-called law merchant as to negotiable securities, what is there to prevent our acting upon the principle acted upon by our predecessors, and followed in the precedents they have left to us? Why is it to be said that a new usage, which has sprung up under altered circumstances, is to be less admissible than the usages of past times? Why is the door to be now shut to the admission and adoption of usage in a matter altogether of cognate character, as though the law had been finally stereotyped and settled by some positive and peremptory enactment? It is true that this scrip purports, on the face of it, to be a security, not for money, but for the delivery of a bond; nevertheless we think that substantially and in effect it is a security for money, which, till the bond shall be delivered, stands in the place of that document, which, when delivered, will be, beyond doubt, the representative of the sum it is intended to secure. Suppose the possible case that the borrowing government, after receiving one or two instalments, were to determine to proceed no further with its loan, and to pay back to the lenders the amount they had already advanced; the scrip, with its receipts, would be the security to the holders for the amount. The usage of the money market has solved the question whether scrip should be considered security for, and the representative of, money, by treating it as such. The universality of a usage voluntarily adopted between buyers and sellers is conclusive proof of its being in accordance with public convenience; and there can be no doubt that by holding this species of security to be incapable of being transferred by delivery, and as requiring some more cumbrous method of assignment, we should materially hamper the transactions of the money market with respect to it, and cause great public inconvenience. No doubt there is an evil arising from the facility of transfer by delivery, namely, that it occasionally gives rise to the theft or misappropriation of the security, to the loss of the true owner. But there is an evil common to the whole body of negotiable securities. It is one which may be in a great degree prevented by prudence and care. It is one which is counterbalanced by the general convenience arising from facility of transfer, or the usage would never have become general to make scrip available to bearer, and to treat it as transferable by delivery. It is obvious that no injustice is done to one who has been fraudulently dispossessed of scrip through his own misplaced confidence, in holding that the property in it has passed to a bona fide holder for value, seeing that he himself must have known that it purported on the face of it to be available to bearer, and must be presumed to have been aware of the usage prevalent with respect to it in the market in which he purchased it.

Lastly, it is to be observed that the tendency of the courts, except only in the time of Lord Holt, has been to give effect to mercantile usage in respect to securities for money, and that where legal difficulties have arisen the legislature has been prompt to give the necessary remedy, as in the case of promissory notes and of the East India bonds. The authorities relied on on the part of plain-

tiff do not appear to us materially to conflict with this view. In Glyn v. Baker, 13 East, 509, which was an action to recover India bonds, and in which it was held that such bonds did not pass by delivery, the bonds were not made payable to bearer, and there was a total absence of proof that they passed by delivery, though it was asserted by counsel in argument that when these bonds, which in the first instance were made payable to the treasurer of the company, had been indorsed by him, they were afterwards negotiable, and passed by delivery from one to another. The inconvenience which would have arisen from this decision was remedied by the immediate passing of 51 Geo. III. c. 64, by which bonds of the East India Company were made transferable by delivery. The case of Partridge v. Bank of England, 9 Q. B. 396, 15 Law J. (Q. B.) 395, and which, amongst other things, turned on the negotiability of dividend warrants of the Bank of England, is not, so far as that question is concerned, altogether satisfactory, as the decision turned also upon other points. The bank was in the habit of paying dividends to those entitled to them by warrants, and it was pleaded and proved that, by a usage of sixty years standing of the bankers and merchants of London, these warrants, which are not made to bearer, were nevertheless negotiable as soon as the party to whom they were made payable had annexed to them the receipt which the bank required before payment would be made. Such a warrant had been obtained by an agent of the plaintiff, authorized to receive his dividends, and had been made over to the defendants for good consideration, in fraud of the plaintiff, so far as the agent was concerned, but without knowledge of such fraud on the part of the defendants. The warrant had been delivered by the defendants to the bank, with whom they had an account, to be carried to their credit in the cash book of the defendants, but had not been carried to the drawing account. The court of queen's bench held this proof of the custom to be a good defense. The court of exchequer chamber reversed their judgment on the ground, among others, that the custom relied on was "rather a practice of trade than a custom properly so-called, and that such a practice could not alter the law according to which such an instrument conferred no right of action on an assignee." We quite feel the force of this distinction, though it is not quite so clear in what sense it was here intended to be applied. Possibly what was meant was, that the custom applied to the warrants of a particular company, and therefore could not form the subject of any general mercantile usage. In Dixon v. Bovill, 3 Macq. 1, where the note was "to deliver so much iron when required to the party lodging this document with me," there was neither a promise to bearer, nor was there any proof whatever of any usage whereby such notes were dealt with as negotiable. The case has therefore, with reference to its facts, no bearing on the present. In Crouch v. Credit Foncier of England, L. R. 8 Q. B. 374, the defendants, a limited company, had issued bonds payable to bearer, "subject to the conditions indorsed on this debenture;" and by the condition so indorsed the bonds were to be paid off by a certain number being drawn at stated periods; in which respect, it may be observed, they bore a close resemblance to the bonds of foreign governments when loans are thus raised by way of bond. A bond thus made, having been stolen from the lawful owner, and having been purchased bona fide by the plaintiff from the thief, was drawn for payment. The plaintiff claimed payment, which was refused, whereupon the action was brought. It was there held by three judges of the court of queen's bench that the plaintiff could not recover, first, because, even assuming that a promise to pay under seal could be considered a promissory note, here the conditions annexed to the promise took away that character from the instrument. No evidence had been offered at the trial as to whether these or similar documents were in practice treated as negotiable, nor was any express admission made as to the point; but it was assumed, from the report of the learned judge before whom the cause was tried, that this had been tacitly admitted. But it was said that, these instruments having been only of recent introduction, it followed that such custom, to whatever extent it had gone, must also have been quite recent. Under these circumstances the court held that, while it was incompetent to the defendants, as an individual company, to give to that which was not a negotiable instrument at law the character of negotiability by making it payable to bearer, the custom could not have that effect, because, being recent, it formed no part of the ancient law merchant. For the reasons we have already given, we cannot concur in thinking the latter ground conclusive. While we quite agree that the greater or less time during which a custom has existed may be immaterial in determining how far it has generally prevailed, we cannot think that, if a usage is once shewn to be universal, it is the less entitled to prevail because it may not have formed part of the law merchant as previously recognized and adopted by the courts. It is obvious that such reasoning would have been fatal to the negotiability of foreign bonds, which are of comparatively modern origin, and yet, according to Gorgier v. Mieville, 3 Barn. & C. 45, are to be treated as negotiable. We think the judgment in Crouch v. Credit Foncier, L. R. 8 Q. B. 374, may well be supported on the ground that in that case there was substantially no proof whatever of general usage. We cannot concur in thinking that, if proof of general usage had been established, it would have been a sufficient ground for re-

fusing to give effect to it that it did not form part of what is called "the ancient law merchant."

In addition to the cases we have already referred to, in which usage has been relied on as making mercantile instruments negotiable, the case of Lang v. Smyth, 7 Bing. 284, was cited as shewing that the question, with reference to instruments of this description, turns upon how far the particular instrument has by usage acquired the quality of negotiability. The action had reference to Neapolitan bonds, with coupons attached to them, which latter referred to a certificate. The plaintiff's agent, being in possession of the coupons belonging to the plaintiff, but not of the certificate, fraudulently pledged the coupons with the defendant, who took them bona fide. On an action by the plaintiff to recover the amount received by the defendant on the coupons, Tindal, C. J., left it to the jury to say whether the coupons without the certificates "passed from hand to hand like money or bank notes;" in other words, "whether they had acquired, from the course of dealing pursued in the city, the character of bank notes, bills of exchange, dividend warrants, exchequer bills, or other instruments which formed part of the currency of this country." The jury, indeed, found in the negative, but it was held by the court of common pleas that the question had been rightly left to them. If the usage had been found the other way, and the court had been satisfied with the verdict, it would no doubt have been upheld.

We must by no means be understood as saying that mercantile usage, however extensive, should be allowed to prevail, if contrary to positive law, including in the latter such usages as, having been made the subject of legal decision, and having been sanctioned and adopted by the courts, have become, by such adoption, part of the common law. To give effect to a usage which involves a defiance or disregard of the law would be obviously contrary to a fundamental principle. And we quite agree that this would apply quite as strongly to an attempt to set up a new usage against one which has become settled and adopted by the common law as to one in conflict with the more ancient rules of the common law itself. Thus, it having been decided in the two cases of More v. Manning, 1 Comyn. 311, and Acheson v. Fountain, 1 Strange, 557, that when a bill of exchange was indorsed to A. B., without the words "or order," the bill was nevertheless assignable by A. B. by further indorsement, Lord Mansfield and the court of king's bench, in the case of Edie v. East India Co., 2 Burrows, 1216, held that evidence of a contrary usage was inadmissible. In like manner, in Grant v. Vaughan, 3 Burrows, 1516, where a cash note payable to bearer had been lost by the owner, but had been taken by the plaintiff bona fide for value, on an action on the note by the latter against the maker, Lord Mansfield having left it to the jury to say "whether such drafts as this, when actually paid away in the course of trade dealing and business, were negotiable or in fact and practice negotiable," and the jury, influenced no doubt by the natural desire to protect the owner of the note, having found for the defendant, Lord Mansfield and the court here again set the verdict aside, on the ground that, the law having been settled by former decisions that notes payable to bearer passed by delivery to a bona fide holder, the judge ought to have directed a verdict for plaintiff.

If we could see our way to the conclusion that, in holding the scrip in question to pass by delivery, and to be available to bearer, we were giving effect to a usage incompatible either with the common law or with the law merchant as incorporated into and embodied in it, our decision would be a very different one from that which we are about to pronounce. But, so far from this being the case, we are, on the contrary, in our opinion, only acting on an established principle of that law in giving legal effect to a usage, now become universal, to treat this form of security, being on the face of it expressly made transferable to bearer, as the representative of money, and, as such, being made to bearer, as assignable by delivery. This being the conclusion at which we have arrived, the judgment of the court of exchequer will be affirmed. Judgment affirmed.

HOPKINS et al. v. VAN ZANDT.

(40 Ill. App. 635.)

Appellate Court of Illinois. June 2, 1891.

Error to circuit court, Cook county; Kirk Hawes, Judge.

The declaration in this action was the ordinary form in assumpsit upon a negotiable promissory note, with count for first indorsee against makers and the common counts.

The pleas were non assumpsit, a plea of failure of consideration, setting up that the note was given to Schuler, the payee named therein, for purchase of certificate No. 113, for fifty shares of stock in Hopkins Manufacturing Company, in case Schuler should wish to sell at maturity of note; that the certificate was never delivered nor tendered; and a plea alleging the execution was obtained by fraud, covin, and deceit.

The instrument declared on and admitted in evidence is as follows:

"$5,000. Chicago, August 15, 1882.

"On the first day of July next after date, we promise to pay to the order of H. B. Schuler, five thousand dollars, at the Commercial Nat. Bank, with interest at six per cent. per annum. Value received.

"Harvey L. Hopkins.
"Daniel B. Whitacre.
"Wm. F. Tucker.

"No. ——. Due ——.

"Ctf. of stock No. 113 for 50 shares of stock in the Hopkins Mfg. Co., to be surrendered on payment of this note."

Indorsed: "Pay to the order of George Van Zandt. H. B. Schuler."

The case was tried by the court without a jury.

The defendants introduced evidence tending to show that no money or thing of value passed from Schuler to either one of the makers of the note; that said Schuler had subscribed for certain shares of stock in the Hopkins Manufacturing Company, but refused to pay for the same unless the makers, who were directors of the company, would undertake to relieve him of the stock within a year. He was to deliver up the stock in case he chose to insist on payment of the note. To show this understanding, the memorandum was affixed to the note before signing. The certificate of stock No. 113 was never the property of the makers of the note.

The following propositions of law were asked by the defendants:

(1) Defendants, Hopkins and Tucker, ask the court to hold, as a proposition of law, that the memorandum at the foot of said supposed note was and is a component part of the contract entered into by the parties to said note.

Held, to this extent, that before judgment entered plaintiff must surrender, or offer to surrender, certificates of stock in question.

(2) Said defendants further ask the court to hold that the obligation to pay the sum of $5,000 and interest was and is no more binding on the signers of said note than was and is the obligation of the holder thereof to surrender said stock certificate described in said memorandum.

Held, to this extent, that before judgment entered plaintiff must surrender, or offer to surrender, the certificate of stock in question.

(3) Said defendants further ask the court to hold that the money named in said note was not payable absolutely, and without condition, upon the 3d of July, 1883, under the terms of the contract between the payee and signers of said note.

Refused. Exception by defendants.

(4) Said defendants further ask the court to hold that the placing of said memorandum at the foot of said note before the signing thereof rendered said note unnegotiable.

Refused. Exception by defendants.

(5) Said defendants further ask the court to hold that the said supposed note is not, and never was, a negotiable instrument.

Refused. Exception by defendants.

(6) Said defendants further ask the court to hold that the plaintiff, George Van Zandt, has not shown any legal title to said supposed cause of action set up in plaintiff's declaration.

Refused. Exception by defendants.

7. Said defendants further ask the court to hold that said George Van Zandt is not entitled to maintain this action in his own name.

Refused. Exception by defendants.

Finding for plaintiff, and damages assessed at $6,018.

Exception by defendants.

C. C. Bonney and L. M. Paine, for plaintiffs in error. Howard Henderson, for defendant in error.

MORAN, P. J. Plaintiffs in error contend that the instrument sued on is not a negotiable promissory note, but is a mere chose in action, the money mentioned therein payable only on the condition of compliance with the memorandum at the foot of the note. We are of opinion that this position is correct. It is "a requisite of commercial paper that it must be payable absolutely, and at all events. If the payment is made to be dependent upon any contingent event, the instrument ceases to be commercial paper. In order to be negotiable, the payment must be unconditional." Tied. Com. Paper, § 25; Gillilan v. Meyers, 31 Ill. 525.

Any memorandum designed to control the operation of the note, written on any part of its face, "within the four corners thereof," will constitute a part of it, and in construing the legal effect and determining the character of the instrument such memorandum

must be considered in connection with the rest of the writing.

This is established by all the text-books on the subject of negotiable instruments, and by numerous adjudged cases abundantly cited in the brief for plaintiffs in error. See Costello v. Crowell, 127 Mass. 293; Blake v. Coleman, 22 Wis. 416; Cook v. Kelsey, 19 N. Y. 415; Prins v. Lumber Co., 20 Ill. App. 236.

Reading the memorandum on the instrument in suit, in connection with the rest of the writing, it shows that the surrender of the certificate of stock mentioned therein is to be made on payment of the note. Surrender or readiness to surrender the stock certificate must necessarily be alleged and proved in order to entitle the payee to recover on the instrument. The payment of the money and the surrender of the stock are to be contemporaneous acts, and the performance of the one can not be required without the performance of the other or an offer to perform it.

The money, then, is not to be paid absolutely, but only on the surrender of the stock certificate, and so the writing lacks that element necessary to negotiability, to wit, payment at all events of a sum certain, at a time certain.

In Consederant v. Brusbane, 14 How. Prac. 487, the note sued on, read:

"New York, March 1, 1855.

"On the 1st day of July, 1856, I promise to pay to V. Consederant, as executive agent of the Company Bureau, Guillon, Goden & Co., the sum of five thousand dollars, for which I am to receive stock of said company, known as premium stock, to the amount of five thousand dollars, value received."

The court said: "Where an instrument in the form of a promissory note in other respects states the consideration of it, and that such consideration had not been received, and also states or clearly implies that it is to be transferred when the money is to be paid, such money is not payable unless a tender of the consideration is made, and therefore the money is not payable absolutely and at all events." See, also, Fletcher v. Thompson, 55 N. H. 308.

In Cook v. Saterlee, 6 Cow. 108, which is cited with approval in Gillilan v. Meyers, supra, the action was on an accepted bill of exchange, in which the acceptors were directed to pay the plaintiff the sum of $400, and take up the drawer's note of a certain date held by the payee for that amount. The court said: "The payment of the money and taking up the note must be simultaneous acts. The acceptors could not take up the note until it was presented, nor were they bound to pay the money until the plaintiff was ready. The instrument was payable on a contingency, and is the same as if it had been said: 'Pay W. C. $400 on his giving up our note.'" See, also, Smillie v. Stevens, 39 Vt. 315; Benedict v. Cowdon, 49 N. Y. 396.

Defendant in error contends that the memorandum on this note must be read as referring to collateral security; i. e. that the stock to be surrendered was held as collateral security for the note. We cannot assent to this contention. There is no allusion in the writing to security or to collateral. The certificate of stock is to be surrendered or delivered, but there is nothing from which we can infer that such surrender is a mere restoring or return to former holders or owners of the said certificate.

The memorandum is not ambiguous. True, it does not state at length the reasons for its being written, and that was unnecessary. It plainly specifies what the payee is to do when the money is paid, and that is sufficient.

The instrument is not negotiable, and this action can not be maintained.

The judgment will therefore be reversed.

Judgment reversed.

NOTE. On appeal to the supreme court in the above case (Van Zandt v. Hopkins, 151 Ill. 252, 37 N. E. 846), Mr. Justice Baker said:

"We see no escape from the conclusion that the negotiability of the instrument must be determined precisely as though those words in the memorandum had been written over the signature of appellees. * * * The transaction was a purchase of the certificate of stock to be delivered simultaneously with the payment of the money. That is to say, the money was to be paid upon the contingency of the readiness and ability of the payee to deliver the certificate of stock, and that fact destroyed its negotiability.

"It was said in Kingsbury v. Wall, 68 Ill. 311: 'It is indispensable that all bills of exchange or promissory notes, to be assignable under our statute or at common law, must be certainly payable, and not dependent on any contingency, either as to the event or the fund out of which payment is to be made, or parties by or to whom payment is to be made.' * * *

"When the memorandum is read into the body of this instrument, it becomes a contract between the party to whom it is made payable and those who signed it that the latter would pay the former the sum of money mentioned, and that he at the same time would deliver to them the certificate of stock."

The rule thus announced is in harmony with all the authorities.

Any language put upon any portion of the face or back of a promissory note, which has relation to the subject-matter of the note, by the maker of it, before delivery, is a part of the contract. Leeds v. Lancashire, 2 Camp. 205; Johnson v. Heagan, 23 Me. 329; Heywood v. Perrin, 10 Pick. 228;

Wheelock v. Freeman, 13 Pick. 165; Manufacturing Co. v. Parr, 8 Neb. 379, 1 N. W. 312; 2 Pars. Notes & B. p. 539; 1 Daniel, Neg. Inst. § 149; 1 Rand. Com. Paper, 129; Chit. Bills, 155; Byles, Bills, 100; Norton, Bills & N. 34, 36–38.

A promissory note must be payable absolutely, and at all events, and not depend on a contingency, in order to come within the definition of a promissory note, so as to be negotiable. Lowe v. Bliss, 24 Ill. 168; McClellan v. Coffin, 93 Ind. 456; Kelley v. Hemmingway, 13 Ill. 604; Smalley v. Edey, 15 Ill. 324; Bank v. McCrea, 106 Ill. 281; Beezley v. Jones, 1 Scam. 34; Gillilan v. Myers, 31 Ill. 525; Hunt v. Divine, 37 Ill. 137; Husband v. Epling, 81 Ill. 172; Baird v. Underwood, 74 Ill. 176; Story, Prom. Notes, § 22; 1 Daniel, Neg. Inst. §§ 41, 45; 1 Pars. Notes & B. p. 48; Norton, Bills & N. 34, 36–38.

DORSEY v. WOLFF.
(32 N. E. 495, 142 Ill. 589.)
Supreme Court of Illinois. Nov. 2, 1892.

WOLFF v. DORSEY.
(38 Ill. App. 305.)
Appellate Court of Illinois. Nov. 21, 1890.

(32 N. E. 495, 142 Ill. 589.)

Appeal from appellate court, Third district; Phillips, Judge.

Assumpsit by Marcus A. Wolff against William M. Dorsey. Plaintiff obtained judgment, which was affirmed by the appellate court. Pending appeal, plaintiff died, and Eliza Wolff, his administratrix, was substituted as appellee. Defendant appeals. Affirmed.

This is an action of assumpsit begun in the circuit court of Macoupin county on May 16, 1889, by Marcus A. Wolff against the appellant, Dorsey, to recover, as attorney's fees, the sum of 10 per cent. upon the amount found to be due upon the promissory notes hereinafter mentioned, in a suit theretofore brought upon said notes. The defendant demurred to the declaration. The demurrer was overruled. The defendant excepted to the order overruling the demurrer, and elected to stand by his demurrer. Thereupon plaintiff's damages were assessed at $1,619, and judgment was rendered in his favor for that amount. The judgment has been affirmed by the appellate court, from which latter court the case is brought here by appeal.

The declaration sets up three notes, executed by the defendant, William M. Dorsey, dated December 31, 1885, payable to the order of George W. Belt, at the banking house of Belt Bros. & Co., in Bunker Hill, Ill.,—the first for $13,586.84, on or before two years after date; the second for $543.47, on or before eighteen months after date; and the third for $543.47, on or before two years after date,—each of which notes, after the maker promises for value received to pay the amount therein named to the order of said Belt, contains the following words: "With eight per cent. interest per annum after maturity, and, if not paid when due and suit is brought thereon, then we promise to pay ten per cent. on the amount due hereon in addition as an attorney's fee, and to be recovered as part of this note, or by separate suit." By the terms of each note, also, the makers and indorsers waive presentment for payment, protest, and notice, etc. The declaration then avers that Dorsey delivered said notes to Belt, and Belt indorsed the same to plaintiff, etc.; that said notes were not paid when due; that suit was brought thereon; that the said 10 per cent. was not paid before or after said suit was brought, and was not recovered in said suit so brought upon said notes as a part thereof, etc. One of the counts, in addition to the foregoing averments, alleges that, after the maturity of the notes, they were placed in the hands of an attorney for suit; that suit was brought thereon, and, the 10 per cent. attorney's fee not having been recovered therein, the plaintiff, before the bringing of the present suit, paid his attorney for his services in said former suit the said sum of $1,619.20.

Palmer & Shutt, for appellant. A. N. Yancey, for appellee.

MAGRUDER, J. (after stating the facts). The main question presented by the assignments of error is whether or not the notes described in the declaration are negotiable instruments. It is claimed by the appellant that the notes are made nonnegotiable by the insertion therein of the written promise of the maker that, if they were not paid when due and suit was brought thereon, he would pay 10 per cent. on the amount due thereon in addition, as an attorney's fee, and to be recovered as a part of the notes, or by separate suit; that the indorsements by the payee did not confer the right upon the indorsee to bring suit in his own name upon the notes; that, even if such indorsements should be held to have conferred upon the assignee the right to bring a suit upon the notes in his own name, it did not confer upon such assignee the right to bring a separate suit upon the stipulations or promises as to the attorney's fee.

Various definitions have been given of a "promissory note." In general terms, it may be defined to be a written promise by one person to pay to another person therein named or order a fixed sum of money, at all events, and at a time specified therein, or at a time which must certainly arrive. Lowe v. Bliss, 24 Ill. 168; Chicago Railway Equipment Co. v. Merchants' Bank, 136 U. S. 268, 10 Sup. Ct. 999; Story, Prom. Notes, p. 2; 3 Kent, Comm. 74; 2 Am. & Eng. Enc. Law, p. 314. A note is none the less negotiable because it is made payable on or before a named date. Chicago Railway Equipment Co. v. Merchants' Bank, supra; Cisne v. Chidester, 85 Ill. 523; Ernst v. Steckman, 74 Pa. St. 13. An instrument for a specified sum of money, and also for the payment of something else, the value of which is not ascertained, but depends upon extrinsic evidence, is not a note. Lowe v. Bliss, supra. A note which provides for the payment, after the maturity thereof, of a certain rate of interest per annum, not exceeding the legal rate, is not made conditional by such provision. Houghton v. Francis, 29 Ill. 244; Reeves v. Stipp, 91 Ill. 609; Laird v. Warren, 92 Ill. 204.

Applying these definitions to the notes mentioned in the declaration in this case, we find that each note is "a note for a sum certain, payable at a fixed date." Dietrich v. Bayhi, 23 La. Ann. 767. The notes are not payable on a contingency, because the maker has the option of paying on or before a certain date; nor are they conditional instruments because they contain the words,

"with eight per cent. interest per annum after maturity." The portion of each note which precedes the stipulation or promise as to the attorney's fee is in itself a complete promissory note. For example, the part of the first note that goes before the provision for the fee is as follows: "$13,586.84. Bunker Hill, Ills., Dec. 31st, 1885. On or before two years after date, for value received, we or either of us promise to pay to the order of George W. Belt, thirteen thousand five hundred eighty-six and 84-100 dollars, payable at the banking house of Belt Bros. & Co. in Bunker Hill, Illinois, with eight per cent. interest per annum after maturity," etc. "Here the sum, time of payment, and payee are certain, and these are the essential characteristics of a promissory note." Houghton v. Francis, supra. The promise to pay the attorney's fee is a promise to do something after the note matures. It does not affect the character of the note before or up to the time of its maturity, either as to certainty in the amount to be paid, or fixedness in the date of payment, or definiteness in the description of the person to whom the payment is to be made. The stipulation or promise as to the attorney's fee cannot, therefore, affect the negotiability of the note, because the negotiability of a promissory note is, for all practical purposes, at an end when it matures. Parties taking it after its maturity cannot claim to be innocent holders without notice of defenses which may be set up by the maker against its collection. If the stipulation for an attorney's fee is of such a character as to make the amount to be paid at maturity uncertain or indefinite, the note cannot be regarded as negotiable so as to authorize a suit upon it by the indorsee; but, where the stipulation does not have such an effect, its insertion in the note does not destroy the negotiability of the note.

When the amount to be paid at maturity is certain and fixed, the maker knows what he has to pay, and the holder knows what he is to receive, from the face of the note itself. Commercial paper is expected to be paid promptly when it is due. A stipulation for an attorney's fee, which is only to be recovered if the note is not paid when due and suit is brought upon it, can have no force except upon the maker's default. If he keeps his contract by paying his note at its maturity, he will not be obliged to pay the additional amount; and no element of uncertainty enters into the contract. By the stipulation, the maker offers to the holder an assurance of his own confidence in his ability to pay without suit, and thereby adds to the value of the paper as promising less expense in its collection. It has been said that "the additional agreement relates rather to the remedy upon the note, if a legal remedy be pursued, than to the sum which the maker is bound to pay; and that it is not different in its character from a cognovit, which, when attached to promissory notes, does not destroy their negotiability." Daniel, Neg. Inst. (4th Ed.) §§ 62, 62a. We do not think that the negotiability of the notes in this case was destroyed by the stipulations therein as to attorneys' fees.

The view here expressed is sustained by the authorities. In Nickerson v. Sheldon, 33 Ill. 372, the note contained this provision; "And we further agree, if the above note is not paid without suit, to pay ten dollars, in addition to the above, for attorneys' fees." In that case the plaintiff did not declare for the $10, and hence the recovery was only for the principal and interest due on the note, but we held the note to be negotiable under the statute, and said: "The amount due by this note is absolutely certain, and it possesses all the requisites of a negotiable instrument under the statute. Stewart v. Smith, 28 Ill. 397. There is no uncertainty as to the precise sum of money to be paid on the maturity of the note." Bane v. Gridley, 67 Ill. 388; Gobble v. Linder, 76 Ill. 157; Barton v. Bank, 122 Ill. 352, 13 N. E. 503. In Stoneman v. Pyle, 35 Ind. 103, the note contained a stipulation for the payment of attorneys' fees should suit be instituted thereon, and it was said: "We see no reason, on principle or authority, or on grounds of public policy, for holding that such a stipulation destroys the commercial character of paper otherwise having that character. * * * So here the defendant had the right to pay the face of the note when due, and avoid the attorneys' fees. As long as the note retained the peculiar characteristics of commercial paper, viz., up to the time of its maturity and dishonor, the amount to be paid on the one hand, and recovered on the other, was fixed and definite." Smock v. Ripley, 62 Ind. 81. In Gaar v. Banking Co., 11 Bush, 180, there was indorsed upon the back of an accepted bill of exchange an agreement by the drawers, indorsers, and acceptors thereof "to pay a reasonable attorney's fee to any holder thereof if the same shall hereafter be sued upon, and also pay interest at the rate of ten per cent. per annum after maturity until paid;" and it was claimed that the written agreement so indorsed upon the bill destroyed its negotiability on the ground that the amount of the attorney's fee was not ascertained, and hence that the bill was for an uncertain amount; but the court held otherwise, and said: "The amount to be paid at maturity was fixed and certain, and it was only in the event that the bill was not paid when due that any uncertainty arose. The reason for the rule that the amount to be paid must be fixed and certain is that the paper is to become a substitute for money, and this it cannot be, unless it can be ascertained from it exactly how much money it represents. As long, therefore, as it remains a substitute for money, the amount which it entitles the holder to demand must be fixed and certain; but when it is past due it ceases to have that peculiar quality denominated 'negotiability,' or to perform the

office of money; and hence anything which only renders its amount uncertain after it has ceased to be a substitute for money, but which in no wise affected it until after it had performed its office, cannot prevent its becoming negotiable paper." In Seaton v. Scovill, 18 Kan. 433, a note for the payment of a certain sum, "with interest at twelve per cent. per annum after due until paid, also costs of collecting, including reasonable attorneys' fees if suit be instituted on this note," was held to be negotiable; and Mr. Justice Brewer, delivering the opinion of the court, quoted with approval the above extract from the Kentucky case, and said: "The amount due at the maturity of the paper is certain; and the only uncertainty is in the amount which shall be collectible in case the maker defaults, at the maturity of the paper, in his promise to pay, and the holder is driven to the necessity of instituting a suit for collection, and then only as to the expenses of such collection." In Sperry v. Horr, 32 Iowa, 184, each of the notes sued upon was for a certain sum, and contained the following words: "With ten per cent. interest until paid; if not paid when due, and suit is brought thereon, I hereby agree to pay collection and attorneys' fees therefor;" and the court held them to be negotiable, saying the attorneys' fees are not part of the sums due on the notes, but are an amount for which the maker may become liable when a legal remedy is enforced against him. Shugart v. Pattee, 37 Iowa, 422; Bank v. Breese, 39 Iowa, 640; Howenstein v. Barnes, 5 Dill. 482, Fed. Cas. No. 6,786; Schlesinger v. Arline, 31 Fed. 648; Sewing Mach. Co. v. Moreno, 6 Sawy. 35, 7 Fed. 806.

Inasmuch as the note is negotiable, and passes by indorsement to the assignee, the agreement as to the attorney's fee also passes to such assignee as a part of the note. The stipulation or promise to pay the attorney's fee is not made with the payee alone. The note is payable to the payee or order. The promise is as much to the holder as to the original payee. The fee is to be paid if the note is not paid when due, whether it is then owned by the payee or by any other holder. Moreover, the attorney's fee is an incident to the main debt and passes with it. Bank v. Ellis, 2 Fed. 44; 2 Daniel, Neg. Inst. § 62a; Adams v. Addington, 16 Fed. 89. The promise to pay it, thereby lessening the cost of collection in case of suit, gives the note currency as well as security, and is regarded as a provision for the indorsee or holder as well as for the payee. Bank v. Ellis, 6 Sawy. 96, 2 Fed. 44. Daniel, in his work on Negotiable Instruments, (volume 2, § 62a,) says: "When the added stipulation is deemed valid, and the bill or note negotiable, such stipulation becomes a part of the acceptor's or indorser's contract, and need not be sued for by the attorney, but it is recoverable by the holder of the instrument." See cases cited in note 3.

A further question arises as to the mode of enforcing the collection of the fee. It is said that it cannot be recovered in a separate suit if it is not embraced in the recovery on the note. Such seems to be the doctrine in Indiana. Smiley v. Meir, 47 Ind. 559. In a case in Iowa, also, where the note sued on contained a stipulation "to pay, in addition to the amount thereof, fifteen dollars attorneys' fees if the note is collected by suit," it was held not to be the intention of the parties that the fee should become due only after the note was collected by suit, but to be their intention that the fee should be recoverable with the amount of the note. Shugart v. Pattee, 37 Iowa, 422. In this state it has been held that the fee is not due when the suit is brought on the note, and therefore cannot be included in the assessment of damages. Nickerson v. Babcock, 29 Ill. 497; Easter v. Boyd, 79 Ill. 325. In the two cases, however, in which this court so held, there was no express agreement in the note that the fee might be recovered in a separate suit. Nickerson v. Babcock, supra; Easter v. Boyd, supra. In the case at bar, the promise is "to pay ten per cent. on the amount due hereon in addition as an attorney's fee, and to be recovered as a part of this note or by separate suit." Whether or not a stipulation to pay the fee to be recovered as a part of the note, in case suit is brought on it for its nonpayment when due, is so far a mere incident to the main debt that a separate suit cannot be brought for the fee after the termination of the suit on the note, is a question which is not presented by this record. We see no reason why the maker of the note may not stipulate that a separate suit may be brought for the fee, and why such stipulation cannot be enforced by the payee or the holder. If the written promise to pay the fee passes to the holder by the indorsement, the written agreement as to the mode of recovery also passes. The fact that the engagement to pay a fee is incidental and ancillary to the main engagement to pay the debt does not prevent the maker of the note from agreeing to submit to a separate suit for the recovery of the fee. We are therefore of the opinion that the present suit is properly brought.

It is further claimed that the agreement to pay 10 per cent. as a fee is usurious. The authorities above referred to hold to the contrary. Stoneman v. Pyle, supra; Sewing Mach. Co. v. Moreno, supra. See, also, 2 Pars. Notes & B. pp. 413, 414; Clawson v. Munson, 55 Ill. 394; Barton v. Bank, 122 Ill. 352, 13 N. E. 503. There is here no violation of the usury law, because the agreement "provides for new or additional compensation or interest for the use of the money because of the failure to pay at maturity. It is not in the nature of a contract for additional interest, but a provision merely against loss or damage to the payee (or holder) specifically pointed out." Barton v. Bank, supra. There is nothing to show

that 10 per cent. on the amount due is an unreasonable fee. The defendant stood by his demurrer to the declaration, which described the notes, and the provision therein for a fee of 10 per cent. The declaration must therefore be regarded as alleging, in substance, that a reasonable attorney's fee was 10 per cent. on the amount due on the notes. Smiley v. Meir, supra. The judgment of the appellate court is affirmed. Judgment affirmed.

(38 Ill. App. 305.)

In error to and appeal from the circuit court, Macoupin county; J. J. Phillips, Judge.

A. N. Yancey, for plaintiff in error and appellant. Palmer & Shutt, for defendant in error and appellee.

WALL, J. This was a suit by appellant against the appellee to recover the sum of $1,619.23 for the attorney's fees specified in the notes sued upon in the preceding case between the same parties. The instruments so sued upon were in the following form, the only difference being as to amount and time of payment: "$543.47. Bunker Hill, Ill., December 31, 1895. On or before eighteen months after date, for value received, we, or either of us, promise to pay to the order of George W. Belt five hundred and forty-three and forty-seven one-hundredths dollars, payable at the banking house of Belt Bros. & Co., in Bunker Hill, Illinois, with eight per cent. interest per annum after maturity; and if not paid when due, and suit is brought thereon, then we promise to pay ten per cent. on the amount due hereon in addition, as an attorney's fee, and to be recovered as a part of this note or by separate suit. The makers and indorsers of this note hereby severally waive presentment for payment, protest, and notice of protest and nonpayment, and no extension of time of payment, by payment of interest in advance or otherwise, shall release either of us from the obligation of payment. William M. Dorsey." The declaration in the present suit averred that these notes were not paid at maturity, that suit was brought thereon, and that the sum therein demanded for said fees had not been recovered in said suit. A demurrer was sustained to the declaration, and judgment was rendered against the plaintiff for costs. The plaintiff brings the suit here by appeal.

It is urged in support of the judgment that the stipulation for the payment of attorney's fees rendered the instrument nonnegotiable; that it was not a promissory note, because by said stipulation it was deprived of the element of certainty as to the sum to be paid, which, it is conceded, is one of the essential features of a promissory note. What, then, is the effect in this respect of such a provision in an instrument which in all other particulars is a promissory note? In Nickerson v. Sheldon, 33 Ill. 372, the instrument contained the following: "And we further agree, if the above note is not paid without suit, to pay ten dollars in addition to the above for attorney's fees,"—the stipulation differing from this only in not providing that the fee might be "recovered as a part of this note or by separate suit." It was objected that this clause rendered the instrument nonnegotiable, but the court held otherwise, and sustained the judgment in favor of the indorsee for the amount of the principal and interest. The plaintiff in that case did not declare for the fee, and did not seek to recover it in the suit on the note, and, as it was not provided that it might be recovered as a part of the note, it is probable he could not successfully have claimed it in said proceeding. In Daniel, Neg. Inst. (2d Ed.) § 62, it is said that such provisions do not impair negotiability, and that the liability so imposed, as for every engagement imported by the note or bill, enters into the acceptor's and indorser's contract. The author admits, however, that the early cases are not all in accord with this view, and many of them hold to the contrary. The later cases are quite harmonious, and the trend of modern decisions is to the effect that where the condition superadded is to waive an exemption or to confer a remedy in respect to collection, thereby rendering the paper more valuable, there is no loss of negotiability. We extract the following from the opinion in Stoneman v. Pyle, 35 Ind. 103, found in the note to Daniel's text commenting upon such a clause: "It may be conceded that a note, in order to be placed upon the footing of bills of exchange, must be for a sum certain; for in no other way can the maker know precisely what he is bound to pay, or the holder what he is entitled to demand. But the note in question, if paid at maturity or after maturity before suit brought thereon, is for a sum certain. On the maturity of the note, the maker knew precisely what he was bound to pay, and the holder knew what he was entitled to demand. In the commercial world, commercial paper is expected to be paid promptly at maturity. The stipulation for attorney's fees could have no force, except upon a violation of his contract by the defendant. Had the defendant kept his contract and paid his note at maturity or afterwards, before suit, he would have been required to pay no attorney's fee, nor would there have been any difficulty as to the extent of his obligation. We see no reason, on principle or authority, or on grounds of public policy, for holding that such a stipulation destroys the commercial character of paper otherwise having such character. The case is quite analogous to a class of cases on the subject of usury. Says Mr. Parsons: 'So if the borrower agrees to pay the sum borrowed at a time certain, or on demand, with lawful interest, and, if he fails to do

so, so much more by way of penalty, even if it be called "extra interest," this is not such usury as would affect the contract, because the borrower has the right to pay the principal and avoid the penalty.' 2 Pars. Notes & B. 413–414. So here the defendant had the right to pay the face of the note when due, and avoid the attorney's fees. As long as the note retained the peculiar characteristics of commercial paper, viz. up to the time of maturity and dishonor, the amount to be paid on the one hand and to be received on the other was fixed and definite." To the same effect are Sperry v. Horr, 32 Iowa, 184; Gaar v. Louisville Banking Co., 11 Bush (Ky.) 180; Seaton v. Scovill, 18 Kan. 433; Adams v. Addington, 16 Fed. 89; Wilson Sewing Mach. Co. v. Moreno, 6 Sawy. 35, 7 Fed. 806; Bank of British North America v. Ellis, 6 Sawy. 96, Fed. Cas. No. 859; Howenstein v. Barnes, 5 Dill. 482, Fed. Cas. No. 6,786; Dietrich v. Bayhi, 23 La. Ann. 767; 1 Rand. Com. Paper, § 205, and notes.

In Seaton v. Scovill, supra, Brewer, J., quotes with approval from the Kentucky case the following, viz.: "The reason for the rule that the amount to be paid must be fixed and certain is that the paper is to become a substitute for money, and this it cannot be unless it can be ascertained from it exactly how much money it represents. As long, therefore, as it remains a substitute for money, the amount which it entitles the holder to demand must be fixed and certain; but when it is past due it ceases to have that peculiar quality denominated 'negotiability,' or to perform the office of money, and hence anything which renders its amount uncertain only after it has ceased to be a substitute for money, but which in no wise affected it until after it had performed its office, cannot prevent its becoming negotiable paper."

The conclusions to be drawn from the foregoing authorities are that the amount payable by a negotiable instrument at maturity must be certain. If this amount is made uncertain, by requiring the payment at maturity of an indefinite sum for collection, expenses as attorney's fees, and the like, then the instrument is rendered not negotiable on account of the uncertainty in amount, and, being not negotiable, indorsees cannot sue upon the instrument, though the payee may sue the maker. But, if the amount payable at maturity is certain, it is not rendered uncertain by a stipulation to pay an indefinite sum for attorney's fees or other expenses to be incurred and paid after maturity. Such provisions tending to render the instrument more valuable, by insuring the holder against loss or expense in making the collection, are not regarded with disfavor by the courts, and pass with the instrument by indorsement, and may be enforced by the indorser in his own name. Tested by those principles, the instruments in question must be regarded as promissory notes, and negotiable as such.

It is argued in behalf of appellee that no consideration is averred or appears from the alleged facts to support the promise to pay such fees. We think the position is untenable, for the reason that whatever supports the undertaking in one particular will support the whole. The instrument being a promissory note, a consideration is implied as well as expressed. That consideration goes to the undertaking as an entirety, supporting each substantive part as well as the whole. It applies as well to the attorney's fee as to the waiver of protest, interest after maturity, or the principal itself. It is all one, and supports the entire contract, all of which, having passed to the indorser, may be enforced by him according to its terms. We are of the opinion the declaration disclosed a cause of action in the plaintiff, and that it was error to sustain the demurrer. The judgment will be reversed, and the cause remanded. Reversed and remanded.

NOTE. Bank of Commerce v. Fuqua, 11 Mont. 285, 28 Pac. 291; Montgomery v. Crossthwait, 90 Ala. 553, 8 South. 498; Bowie v. Hall, 69 Md. 433, 16 Atl. 64; Sperry v. Horr, 32 Iowa, 184. Contra, First Nat. Bank v. Babcock, 94 Cal. 96, 29 Pac. 415; Altman v. Rittershofer, 68 Mich. 287, 36 N. W. 74. See, for further discussion sustaining this rule, Benn v. Kutzschan, 24 Or. 28, 32 Pac. 763; Farmers' Nat. Bank v. Sutton Manuf'g Co., 3 C. C. A. 1, 52 Fed. 191; Wood's Byles, Bills & N. 167, note (bottom page). See Benn v. Kutzschan and Farmers' Nat. Bank v. Sutton Manuf'g Co. for a collection of the cases pro and con. Also Tied. Com. Paper, § 285, note; Stoneman v. Pyle, 35 Ind. 103; Sperry v. Horr, 32 Iowa, 184; Iron City Nat. Bank v. McCord, 139 Pa. St. 52, 21 Atl. 143; Leggett v. Jones, 10 Wis. 35; Second Nat. Bank v. Wheeler, 75 Mich. 546, 42 N. W. 963.

MILLIGAN v. HOLBROOK.

(48 N. E. 157, 168 Ill. 343.)

Supreme Court of Illinois. Nov. 1, 1897.

Appeal from appellate court, First district.

Assumpsit by Charles F. Milligan against Zephaniah S. Holbrook. From a judgment of the appellate court (68 Ill. App. 631) affirming judgment for defendant, complainant appeals. Affirmed.

G. W. & J. T. Kretzinger, for appellant. Ashcraft, Gordon & Cox, for appellee.

BOGGS, J. Appellant brought assumpsit against the appellee in the circuit court of Cook county to enforce an alleged liability as guarantor of a note given by one Day to the appellant, the payee, and indorsed in blank by appellee. The defense was that, by virtue of a special agreement entered into between appellant and appellee at the time the note was indorsed, the liability of the appellee was that of an indorser. The cause was submitted in the circuit court to the court, without a jury. The judgment was adverse to the appellant. He brought the case by appeal to the appellate court of the First district, and, the judgment of the circuit court being affirmed, he has prosecuted a further appeal to this court.

The only question arising upon the record in this court is whether the circuit court erred in holding that the fourth proposition correctly stated a principle of law applicable to the contention. The proposition is as follows: "Held as law in this case that if the court should believe from the evidence that at the time the name of Holbrook was placed on the back of the note in evidence, that plaintiff said in substance to Holbrook, 'You indorse these notes, do you not?' that Holbrook replied, 'I indorse these notes because I consider Mr. Day good, and you have got to exhaust him before you can collect of me,' and that plaintiff replied, 'All right,' and that thereupon Holbrook put his name on the back of the notes, and they were delivered to the plaintiff; and if the court should believe from the evidence that no other or different arrangement or language was used than aforesaid, and that no other agreement or understanding was had than embraced in the language aforesaid,—that then and in that case Holbrook, as matter of law, contracted as indorser, and not as a guarantor, and this action cannot be maintained." The presumption of the law is that the liability of the appellee is that of a guarantor, but, as the note is still in the hands of the payee, that presumption may be rebutted, and is rebutted if it appears that the real contract between the appellee and the payee was that the liability of the appellee is that of an indorser. Bank v. Nixon, 125 Ill. 615, 18 N. E. 293. So far as the fourth proposition purports to state a principle of law, the rule announced is correct. The matters of fact referred to in the proposition tended to establish an agreement limiting the liability of the appellee to that of indorser, and that the preponderance of the evidence supported the judgment is conclusively settled by the decision of the appellate court. The judgment of the appellate court is affirmed. Affirmed.

SCHOOL DIST. OF CITY OF KANSAS CITY v. STOCKING et al.

(40 S. W. 656.)

Supreme Court of Missouri. May 4, 1897.

In banc. Appeal from circuit court, Jackson county.

Action by the school district of the city of Kansas City against William L. Stocking and another, executors of George Sheidley, deceased, on three notes. Judgment for plaintiff, and defendants appeal. Affirmed.

W. L. Stocking and C. O. Tichenor, for appellants. Gage, Ladd & Small, for respondent.

MACFARLANE, J. Plaintiff, a public-school corporation, sues the defendants, as executors of George Sheidley, deceased, upon three promissory notes, dated March 9, 1894, each for $5,000, payable, respectively, 6, 12, and 18 months after date, one of which is as follows: "$5,000.00. Kansas City, Mo., March 9, 1894. Six months after date, I promise to pay school district of Kansas City, Missouri, or order, at the Union National Bank, Kansas City, five thousand dollars, for value received, with interest ——— at the rate of no per cent. per annum. George Sheidley." By answer, defendants admit the execution of the notes, but set up as defenses—First, that at the time of their execution the testator was of unsound mind, and incapable of making them; second, that they were wholly without consideration; and, third, that they were never delivered. The case was tried to a jury, and a verdict was found for the plaintiff on all three counts. Judgment was rendered in accordance therewith, and defendants appeal.

On the question of want of capacity of deceased to make the notes, defendants assign no error, but agree that that issue was fairly tried. The evidence shows that the building occupied by the school district for a library was regarded as wholly insufficient, and for several years prior to the execution of these notes the erection of a new building had been under consideration by the board of education. For the purpose of purchasing a site and erecting the building, an issue and sale of bonds of the district had been contemplated. Previous to this transaction, George Sheidley had expressed an intention of making a donation of $25,000 to the district, to be used in the purchase of books. About this time the board came to the conclusion that the proceeds of bonds could not be lawfully applied to the purchase of a site for the building, and, there being no other funds with which to make such purchase, it concluded that the enterprise would have to be abandoned. Sheidley, being informed of the difficulty, and probable failure of the enterprise for want of means to purchase a site, advised the board of his willingness to allow it to use the intended donation in any manner it saw fit. A meeting between him and a committee of the board was held, and his proposed donation for that purpose was accepted. Sheidley at the time did not have the ready money, but proposed giving his notes to the district, payable in the future, but promising that they would be paid whenever the money was needed. It was thereupon agreed that he should make five notes, of $5,000 each, payable to the district; and, as he was expecting to leave Kansas City the next morning, he agreed to place them in the hands of Thomas B. Tomb, for the board, to be handed to it when called for. The next morning, March 9, 1894, he executed the notes and delivered them to Tomb, as agreed, and informed the president of the board that he had done so. A meeting of the board was immediately called, and the president made the following report of what had been done: "Since recess was taken last Thursday evening, we had, in company with J. C. James and J. V. C. Karnes, called on Mr. George Sheidley, who had heretofore offered to give $25,000 towards buying books for use in the library building to be erected, and, owing to the embarrassment of the board about securing a site for said building, Mr. Sheidley agreed to change the form of his donation, and was willing to allow this sum to be used in such way as the board might deem best to secure the erection of said building; and, to make sure of such offer, he has placed said sum in the hands of Thomas B. Tomb, to be held for this board, and to be turned over whenever the board may call for the same to be used in securing said building." A vote of thanks was thereupon tendered to Mr. Sheidley for his liberal donation, and the following resolution was adopted: "Whereas, in the judgment of this board it is expedient that the school district borrow $200,000 for the purpose of erecting a public library building, containing the offices of the board of directors of the school district, and to issue therefor the bonds of the district: Therefore, resolved, that there be submitted to the qualified voters of the school district of Kansas City, in the county of Jackson and state of Missouri, at the biennial election for school directors to be held on the 3rd day of April, 1894, a proposition authorizing the board of directors of said school district to borrow on behalf of the school district the sum of $200,000 for the purpose of erecting a public library building, containing the offices of the board of directors of the school district, and for the payment thereof to issue the bonds of the school district. Such bonds to be of the denomination of $1,000 each, dated July 2, 1894, payable twenty years from their date, with interest at the rate of four per cent. per annum, payable semiannually on the second days of July and January in each year; both principal and interest payable, in gold coin of the United States of America, in the city and state of New York. Resolved, that the president and secretary of the board be, and they are hereby, authorized and directed to sign and publish, according to law, notice of the submission of such proposition, and to take all

other necessary steps for the proper submission thereof, in accordance with the terms of this resolution." In pursuance of this resolution an election was held which resulted in an almost unanimous vote in favor of borrowing $200,000 for the purpose of erecting a public library building. Bonds were thereafter issued and sold, and the proceeds were placed in the hands of the treasurer. This was all concluded July 14, 1894. Mr. Sheidley was taken sick about the 1st of July, 1894, and was thereafter, until his death, incapable of attending to business. On the 14th of July, 1894, the president of the board demanded the notes of Tomb, who declined to deliver them, on account of objections by members of Sheidley's family. The board afterwards, in February, 1895, purchased a site for $30,000, $5,000 of which was paid in cash, out of the general revenues of the district, and assumed mortgages on the land, extending over a number of years, for the balance of the purchase price. The board thereupon proceeded in the erection of the building.

At the request of the plaintiff the court gave the jury the following instructions: "(1) You are instructed that, in order to constitute a consideration for the notes in suit, it is not necessary that George Sheidley should have himself received, or have expected to receive, any benefit on account thereof. But, if you believe from the evidence that the plaintiff, through its board of education, relying upon the fact that the five notes had been executed and left with Mr. Tomb, incurred and paid expense in connection with the submission to a vote of the people of the question as to the issue of the bonds of the district, and other expenses in connection with the issue of the bonds, and did incur a liability of $200,000 by the issue and sale of the bonds, and that said action of the plaintiff, through its board of education, was induced by the promise of the defendant to execute said notes, and by his subsequent execution thereof, and that the purpose of defendant in making said promise and executing said notes was to enable and induce the plaintiff to take such action, this constitutes a good consideration for the notes. (2) The jury are instructed that, to constitute a delivery of the notes in suit, it was not necessary that they should be placed by the defendant himself in the hands of any member of the board of education. But if you believe from the evidence that in pursuance of an arrangement and a promise to that effect made by George Sheidley to Messrs. Yeager, Karnes, and James on the evening of March 8, 1894, he did on the next day execute the notes, and leave them with Mr. Tomb, for the board of education, with instructions to him to hand them to the board when any of its members should call for them, intending thereby to place them at the disposal of the board of education, this constitutes, in law, a complete delivery of the notes to the plaintiff." Defendants requested, and the court refused to give, the following instructions: "(1) The jury are instructed that a promissory note is but the promise to pay money in the future, and, if made and delivered purely as a gift, is without consideration, and cannot be enforced against the maker. Such a note is but a promise to make a gift in the future. (2) The only act claimed to have been done by plaintiff upon the strength of the verbal promise of George Sheidley to give $25,000 is the submission for the voting of certain of its bonds, for which plaintiff received full value. (3) The jury are instructed that although it may be the fact that plaintiff would not have submitted the proposition to vote for bonds to build a library building, except for a promise on the part of George Sheidley to give $25,000, yet you are instructed that such submission constitutes no consideration for the notes referred to in the petition. (4) The jury are instructed that, at the time George Sheidley signed the notes sued on, there was no subsisting liability on the part of said Sheidley to the plaintiff, and hence there was no consideration for said notes, and your verdict must be for defendant. (5) The jury are instructed that the notes sued on are in the possession of one Tomb, and always have been, and that, therefore, plaintiff is not the holder thereof, and hence your verdict must be for defendant. (6) Under the pleadings and the evidence, your verdict must be for the defendant."

1. The substantial and most important controversy in this case is whether, under the evidence, any consideration for the notes sued upon was shown. It is conceded by plaintiff's counsel that Sheidley received no benefit for his promises which can be regarded as a sufficient consideration to support them. That the notes were intended by the maker, and accepted by the payee, as voluntary donations, is unquestioned. "It is essential to a gift that it go into effect at once, and completely. If it regards the future, it is but a promise, and, being a promise without consideration, it can not be enforced, and has no legal validity." Spencer v. Vance, 57 Mo. 429; Tomlinson v. Ellison, 104 Mo. 105, 16 S. W. 201. That the note of a donor to a donee is not the subject of a gift is well-settled law. Such a note is but the promise of the donor to pay money in the future. The gift is not completed until the money is paid. There is no delivery of the gift, but a mere promise to deliver in the future. Such a note, treated purely as a gratuitous promise, cannot be enforced either in law or equity. The question, then, is, can these notes be enforced, as valid contracts, notwithstanding Sheidley received no benefit therefrom, and intended them as purely gratuitous donations? If so, there must have been a legal consideration moving from the district to him. To constitute such consideration, it is not essential that Sheidley should have derived some benefit from the promise. The consideration will be sufficient to support the promise if the district expended money and incurred enforceable liabilities in reliance thereon. If the expense was incurred and the lia-

bility created in furtherance of the enterprise the donor intended to promote, and in reliance upon the promises, they will be taken to have been incurred and created at his instance and request, and his executors will be estopped to plead want of consideration. The gratuitous promises will thus be converted into valid and enforceable contracts. Brooks v. Owen, 112 Mo. 251, 19 S. W. 723, and 20 S. W. 492; Koch v. Lay, 38 Mo. 147; Steele v. Steele, 75 Md. 477, 23 Atl. 959; University of Des Moines v. Livingston, 57 Iowa, 307, 10 N. W. 738; Simpson College v. Tuttle, 71 Iowa, 596, 33 N. W. 74; Trustees v. Garvey, 53 Ill. 401; Amherst Academy v. Cowls, 6 Pick. 427; Pitt v. Gentle, 49 Mo. 74; Richelieu Hotel Co. v. International Military Encampment Co., 140 Ill. 248, 29 N. E. 1044. Mr. Parsons says: "On the important question, how far voluntary subscriptions, for charitable purposes, as for alms, education, religion, or other public uses, are binding, the law has, in this country, passed through some fluctuation, and cannot now be regarded as, on all points, settled. Where advances have been made or expenses or liabilities incurred by others, in consequence of such subscriptions, before any notice of withdrawal, this should, on general principles, be deemed sufficient to make them obligatory, provided the advances were authorized by a fair and reasonable dependence on the subscriptions; and this rule seems to be well established. And the expenses or liabilities need not have been incurred by the plaintiff, if others of the subscribers incurred them on the faith of the defendant's subscription." 1 Pars. Cont. (8th Ed.) side page 453. In Koch v. Lay, supra, Wagner, J., says: "Where notes are given by one or more persons to any corporation or other legal person, or any trustees, by way of voluntary subscription to raise a fund to promote an object, these notes are open to the defense of want of consideration unless the payee has expended money or entered into engagements which by legal necessity must cause loss or injury to the payee if the notes are not paid. There are many cases which hold that gratuitous promises may be enforced where they have operated to induce engagements and liabilities within the knowledge of the promisor. Incurring expense and assuming liabilities in consequence of the promise is regarded as sufficient consideration for the promise." It appears from the evidence, beyond any reasonable controversy, we think, that while the board of directors regarded the erection of a building for a public library, in connection with the schools of the district, to be of great public need, yet it had wholly abandoned the enterprise, for the reason alone that it had not on hand, and could not procure, the means necessary for purchasing the land on which to build it. At this juncture Mr. Sheidley made his offer to donate $25,000 to the district, to be used by the board of directors in such way as it might deem best to secure the erection of said building. This offer was accepted, and the notes in suit were executed, and placed in the hands of Tomb, as hereinbefore stated. Sheidley knew perfectly well the difficulty under which the board was placed, and his intention unquestionably was that the money, when paid, should be applied to the purchase of a site for the building, and that the enterprise should go on at once. The board of directors, relying upon these promises, immediately submitted to a vote of the district a proposition to borrow $200,000 and issue the obligations of the district for its payment. The election was held at an expense to the district of about $550. The bonds were thereafter issued and sold, and valid obligations of the district were thereby created for $200,000. Under the well-settled principles of law above stated, the notes are supported by a sufficient consideration. In reliance on the promises, and in furtherance of the public enterprise they were intended to promote, the district, in good faith, expended a considerable sum in holding an election, and incurred, presumably, a valid indebtedness for a large amount. The expenditure incurred and the indebtedness created were necessary in order to secure money for the erection of the building. This necessity was well known to Sheidley when he executed the notes.

2. It appears from the evidence that Sheidley was adjudged insane in October, 1894, and that the site for the building was not bought until February, 1895. From these facts it is argued that the promises were revoked before the site was purchased, and there was therefore no consideration for the notes. It cannot be said that the purchase of a site and the erection of the building were independent enterprises. They constituted but one undertaking, namely, that of securing a library building. The notes became valid and irrevocable contracts as soon as the district, relying upon their payment, expended money or incurred liability in promoting the general enterprise. This occurred before Sheidley was adjudged insane, and his insanity or death thereafter could not revoke them.

3. The purchase of the site before the notes were collected could not effect a revocation of agreements which had become valid and binding obligations before that time, though the application of the proceeds had been expressly limited to the purchase of the site, for the reason that the purchase price has not yet been paid. The proceeds are still to be applied to such purchase. But it does not appear that any such condition was imposed. The board of directors were given the discretion to use the proceeds in such way as it might deem best in order to secure the erection of the building. There would be no misapplication of the funds, under the conditions of the gift, though applied to the construction of the building.

4. It is also insisted that there was no consideration for the promises, for the reason that the erection of the building was legally incumbent on the board, and the voluntary per-

formance of an act which was legally incumbent on the party to perform is not, in law, a sufficient consideration. This contention has a sufficient answer in the fact that no imperative legal duty rested upon the board to provide a library building. The board of directors is given the power to establish and maintain libraries, but it is not made its duty to do so. The discretion is to be exercised by the board in view of all the circumstances and conditions. Rev. St. 1889, §§ 8109, 8112. But boards of education are given express power to accept gifts for the erection of library buildings. Acts 1891, p. 205. Th ugh they may determine to provide a library, the character and cost may be determined by the voluntary aid they may receive or be promised. Work done or expenses incurred in reliance upon promises to give in the future would as well furnish a consideration for such promises as it would if the entire enterprise depended upon the promises. We think the consideration for the notes sufficient, and find no error in giving and refusing instructions on this branch of the case.

5. We think there was a sufficient delivery of the notes. It was not essential that the actual manual possession should have passed to some member of the board in order to effect a delivery. A constructive delivery was sufficient. All that was necessary was that the control of the notes should have passed from Sheidley with his consent, and that they should have been placed by his direction under the power and control of the board of education. Daniel, Neg. Inst. § 63a; Richardson v. Lincoln, 5 Metc. (Mass.) 201; Welch v. Dameron, 47 Mo. App. 227. The evidence shows that the notes were placed by Sheidley in the hands of Tomb, with directions to hand them to the board when called for. This was done pursuant to a previous agreement had with the board. Tomb testified that, when the notes were handed to him, Mr. Sheidley said that "whenever the board of education called for them I should give them to them." The instruction on the question of delivery properly declared the law.

6. Defendants insist that if the board of education was induced to order and hold an election, and to issue the bonds of the district, by the promise of Sheidley to give $25,000 in furtherance of the enterprise, then such promise is void, as being contrary to public policy. It is undoubtedly the policy of the law that all public officers should be uninfluenced and unbiased in the discharge of their official duties, and, as said by Mr. Bishop: "Any contract between an officer and a private person by which the former undertakes to do anything of official duty, right or wrong, in accord with such duty or contrary to it, is, in a greater or less degree, an obstruction to the unbiased exercise of his office, even where it does not influence him corruptly, and is therefore void." Bish. Cont. § 500. But we are unable to see that the sound policy of the state was violated in this action of the board, all the circumstances being considered. The action of the board was not induced by the promises of Sheidley, in the sense that its judgment and discretion were influenced thereby. The board had before that exercised its judgment, and determined the desirability of a new public library building. The obstacle in the way of voluntary action was the need of money to purchase a site. Its conclusion, and the only obstacle in the way of carrying it out, were well known. The promises of Sheidley only empowered the board to act upon its judgment already formed and publicly declared. It made the way clear for the board to perform what it considered a public duty. We can see nothing in the action of the board of education calculated to control or influence its duty to the public, or which is the least immoral in its tendency. The policy of the state, by express law, favors and encourages donations for the erection of public library buildings, and we can see nothing inconsistent with the free, honest, and impartial exercise of official discretion for a board of education to regulate its action, to some extent, with reference to the amount, value, and character of voluntary contributions, whether made or promised. The fact that the statute gives power to boards of education to establish and maintain libraries for the use of the public school districts thereof is a recognition by the state of their utility and desirability, and the only question boards really have to deal with is the ability of the district to establish and maintain them. Boards must necessarily be influenced more or less in their actions by the private contributions that may be secured or promised. Such action, when not otherwise influenced, cannot be regarded as contrary to public policy.

7. It is insisted by plaintiff that, the illegality of the contract not having been pleaded as a defense, the question should not be considered on this appeal. The rule is that if a plaintiff, in order to make out his cause of action, is required to show that the contract sued upon is, for any reason, illegal, the court should not enforce it, whether pleaded as a defense or not. But when the illegality does not appear from the contract itself, or from the evidence necessary to prove it, but depends upon extraneous facts, the defense is new matter, and must have been pleaded in order to be available. Musser v. Adler, 86 Mo. 446; Association v. Delano, 108 Mo. 217, 18 S. W. 1101. In this case, defendants pleaded want of consideration, and the notes are concededly mere gratuitous promises to pay in the future. The notes were therefore void as gifts. In order to prove that they were valid contracts, supported by a sufficient consideration, it became necessary for plaintiff to prove the entire transaction between Sheidley and the board of education, and the subsequent action of the board taken in reliance on the promises. If the notes had been illegal, as against public policy, the fact was necessarily disclosed by plaintiff in making out its case, and it would have been the duty of the court to

deny its assistance, whatever the condition of the pleading. The question was therefore sufficiently raised by the instruction in the nature of a demurrer to the evidence to require its consideration on appeal.

8. Evidence was admitted on the trial, over the objection of defendants, that Mr. Sheidley was a man of large means. This evidence was clearly inadmissible on the issue raised upon the defense, that the notes were without consideration. But the defense was also made that, at the time the notes were executed, defendants' testator was of unsound mind, and incapable of transacting business. The notes amounted to $25,000,—a very large sum to give away,—and, for a man of moderate circumstances, would have furnished a circumstance tending to prove want of capacity. To rebut that tendency, evidence that he was a man of wealth was admissible. If defendants wished to limit the effect of the evidence, they should have asked an instruction for that purpose. Garesche v. St. Vincent's College, 76 Mo. 332; Stanard Milling Co. v. White Line Cent. Transit Co., 122 Mo. 273, 26 S. W. 704. The judgment is affirmed.

BARCLAY, C. J., and GANTT, SHERWOOD, BURGESS, and BRACE, JJ., concur. ROBINSON, J., dissents.

BUEHLER v. McCORMICK.

(48 N. E. 287, 169 Ill. 269.)

Supreme Court of Illinois. Nov. 8, 1897.

Appeal from appellate court, First district. Bill by John W. Buehler against Tilton H. McCormick to foreclose as a mortgage a deed of trust. From a judgment of the appellate court (67 Ill. App. 73) reversing a decree in favor of complainant, complainant appeals. Affirmed.

Goldzier & Rodgers, for appellant. Newman, Northrup & Levinson (Elmer E. Jackson, of counsel), for appellee.

CARTER, J. The circuit court of Cook county entered a decree in favor of the complainant to the bill, John W. Buehler, foreclosing as a mortgage a deed of trust given by the defendant, Tilton M. McCormick, upon real estate. The appellate court for the First district has reversed that decree, and dismissed the bill. The case is here on Buehler's appeal. The facts are these: McCormick, being indebted to William Haerther for the purchase of the real estate, on March 27, 1893, executed his note for $820, payable to his own order, one year after its date, indorsed it in blank, and delivered it to Haerther. To secure its payment, he also executed his deed of trust upon the property to one Austin as trustee, and delivered the same also to Haerther. Before the note was due, and only about a month after given, McCormick paid Haerther $300, and Haerther credited it on the back of the note. About three weeks later he made another payment of $100 on the note, for which Haerther gave him a receipt; and a few days later, by agreement with Haerther, he delivered to him (Haerther) a certificate of deposit of the Milwaukee Avenue State Bank for $515 in full payment of the balance of the note, principal and interest. McCormick did not, when he made the last payment, take up the note or deed of trust, nor did he ask for a return of the same to him, but relied upon the trustee, Austin, who had a desk in the office of Haerther, to release the deed of trust, and to return the same and the note to him; but Austin neglected the matter, and moved out of Haerther's office, whereupon McCormick sought Haerther, and endeavored to obtain his note and deed of trust. Whether Haerther avoided him or not, he was unable to get any satisfactory response until in the latter part of September, when he obtained from Haerther a receipt in full for the amount of the note and interest. About two months after the note was executed, and some days after it had been fully paid in the manner before stated, Haerther, being indebted to the Garden City Banking & Trust Company, of which appellant, Buehler, was the cashier, gave the bank his note therefor, and delivered, among others, the note in question to the bank as collateral security. Some two months later, about July 20, 1895, the bank sold the note in controversy under the pledge, and appellant, Buehler, bought it at the public sale. Before the sale, notice was served upon the bank that the note had been paid in full, and demand was made for the surrender of the note and deed of trust. Appellant contends that it does not appear that Haerther held the note when it was paid, but, as it was indorsed and delivered to him by McCormick in payment for the property purchased of him, and he did not transfer it to the bank until after it was paid, and there being no evidence that any one else held the note in the meantime, it must be presumed that he was the legal holder of it.

It is not contended that appellant acquired any rights, as against appellee, superior to those possessed by the bank before it sold and delivered the note to him (Buehler). But counsel for appellant, while recognizing the common-law rule, as applied and followed by this court in Olds v. Cummings, 31 Ill. 188, and many subsequent cases down to McAuliffe v. Reuter, 166 Ill. 491, 46 N. E. 1087, that the assignee of a mortgage takes it subject to all equities existing between the assignor and the mortgagor, insist that the rule cannot be applied in this case; to use their language: "(1) Because, by the tenor of the instruments, the maker is estopped from availing himself of such equities; (2) because no assignment, equitable or otherwise, of the mortgage in question is involved; (3) because the negligence of appellee, which enabled the perpetration of a fraud upon appellant, deprives him of the right to urge his equities as against appellant." And in this connection it is urged that, as the note was made payable to the order of the maker, and indorsed by him in blank, and delivered to Haerther, it thereafter passed by mere delivery, the same as if it had been made payable to bearer, and that the trust deed recites that the maker "is justly indebted unto the legal holder of the principal promissory note hereinafter described in the principal sum of $820, being part of the purchase money for the premises thereby conveyed," etc., and describing the note; and the point is made that in such a case the equities of the maker against an innocent holder cannot prevail, even although the instrument is not assignable, either at common law or by statute. It is, of course, apparent that McCormick would have had a complete defense to any suit which Haerther might have brought, either upon the note or to foreclose the mortgage. It is also apparent that, as the note passed from Haerther to the bank before its maturity, and without notice that it had been paid, the bank could recover from the maker the amount appearing to be unpaid and due upon it in an action on the note. It is clear, also, that, unless the mortgagor has estopped himself, or the case falls within some of the exceptions which have been created to the general rule that the assignee of a mortgage takes it subject to all of the equities existing between the mortgagor and

mortgagee, the defense that McCormick paid the debt in full to the legal holder of the note, even before its maturity, must be held a valid one. The point made by appellant that Haerther was not mentioned either in the note or mortgage we regard as immaterial under the facts. See Shippen v. Whittier, 117 Ill. 282, 7 N. E. 642; McAuliffe v. Reuter, supra. When McCormick indorsed the note in blank, which he had made payable to himself, and delivered it, with the deed of trust, to Haerther, Haerther became the legal holder, and both instruments were, of course, while in his hands, subject to the defense of payment; but, as the note passed by delivery as if payable to bearer, the bank took it before its maturity, free from the defense of payment. He was, in fact, an assignee of the note, and by virtue of that fact an assignee of the mortgage also, though, as to the mortgage, only an equitable assignee. 1 Rand. Com. Paper, pp. 231, 243; 1 Daniel, Neg. Inst. 729. Because the mortgage secured the payment of the note to the legal holder, instead of the payee by name, cannot, upon any legal principle which we are aware of, make any difference. It was no more a contract with successive legal holders taking by mere delivery than it would have been in the other case with successive indorsees. In both cases the note secured would be negotiable, and would pass free from all equities between the parties; but the legal and equitable character of the mortgage remained the same, and, when the mortgagor paid the deed to Haerther, who was the legal holder of the note, the effect was the same as it would have been if Haerther had been named as payee. We cannot hold that by the terms of the instrument all the attributes of negotiable paper were imparted to this deed of trust. Nor does the case fall within the principles announced in either of the cases cited.—Railroad Co. v. Thompson, 103 Ill. 187, or Miller v. Larned, Id. 562. In the former case this court held that the rule applied in Olds v. Cummings did not apply, and, among other things, said: "In the case of an ordinary mortgage or deed of trust to secure a temporary loan from one individual to another, the note or evidence of the indebtedness taken at the time, although it may be negotiable, is not given for the express purpose of being put upon the market, and used as a permanent investment of capital, as in the case of railroad securities; nor does the mortgagee in such case, as a general rule, rely wholly on the security which the mortgage affords, as is always done in the case of railroad mortgage bonds." In the Miller-Larned Case it was held that it did not apply where the mortgage was given to secure the payment of accommodation paper, for the reason that the very purpose for which such paper is given is that it may be assigned; and, as it is without consideration, it cannot be enforced at all between the original parties, and the application of the rule in Olds v. Cummings would defeat the security, and render it nugatory in every such case. It is plain that the case at bar does not fall within the principle of either of those cases.

Nor does any ground appear upon which to base the alleged estoppel against McCormick contended for by appellant. It is said that by McCormick's negligence in not taking up the note when he paid it he put it in the power of Haerther to perpetrate a fraud on an innocent party. But this is not a suit upon the note, but upon the deed of trust to foreclose it in equity. And it was held in Olds v. Cummings that it was the duty of the purchaser to inquire of the mortgagor if any reason exists why it should not be paid, and in Walker v. Dement, 42 Ill. 280, it said: "To be protected, the assignee must omit no duty, nor fail to exercise every precaution, which prudence demands of all men when acting in reference to matters of moment." He knows from the papers who the mortgagor is, and may, by notice and inquiry, protect himself in making the purchase much more readily than the mortgagor may, if, for any reason, he is unable to obtain at once the cancellation and return of his obligations. The assignee is charged with knowledge of the law that a mortgage is assignable only in equity, and subject to the equities between the original parties to it, and he cannot relieve himself from the consequences of his own negligence by simply showing that the mortgagor failed to take up the note and mortgage when he paid the debt to the then legal holder. The case differs in several material respects from Keohane v. Smith, 97 Ill. 156, which made no reference to Olds v. Cummings and subsequent cases. In the Keohane Case, while the release was obtained from the mortgagee, yet, when the debt secured was paid to him, he was not the holder of the note, but had assigned it to the true owner for whom he loaned the money, and when it was paid to him he had no authority to receive it. Thus it was said by Mr. Justice Dickey in his separate opinion in Ogle v. Turpin, 102 Ill. 155, that: "Where it is the duty of any one to see that commercial paper is paid, a payment to the payee not in possession of the paper will not affect the assignee. That was the case in Keohane v. Smith, and on that point that case turned." Neither was such payment in pursuance of any original contract entered into when the loan was made, as in McAuliffe v. Reuter, supra. See, also, Towner v. McClelland, 110 Ill. 542. It is apparent that all that has been said in the different cases cannot be fully reconciled, but it is clear, we think, that the case at bar falls within the general principle announced by this court in Olds v. Cummings, and in a long line of cases since that case was decided. The judgment of the appellate court must be affirmed. Judgment affirmed.

COMMERCIAL NAT. BANK OF CHICAGO v. LINCOLN FUEL CO.

(67 Ill. App. 166.)

Appellate Court of Illinois. Nov. 30, 1896.

Sleeper, McCordle & Barbour, for appellant. Spencer Ward, for appellee.

SHEPARD, P. J. This is an appeal from a judgment of the superior court, rendered there upon an appeal from a similar judgment before a justice of the peace.

One H. L. Cooper drew his check upon the appellant for $63.25, payable to the order of appellee, in settlement of an account, and delivered the same to the firm of Allan F. Gordon & Co., who, then and before, acted as agents of appellee in the sale of coal, and as to certain customers, not including Cooper, in making collections for coal sold by them.

Having received the check in question, Gordon & Co. indorsed the same by the name of appellee, "Per Allan F. Gordon & Co., Agts.," and deposited it to the credit of their own account in the Oakland National Bank, and the same was duly paid by the drawee, the appellant, in the regular course of business through the clearing house.

Gordon & Co. subsequently became insolvent, and, upon demand made upon Cooper, by appellee, for payment of the account for which the check had been delivered to Gordon & Co., Cooper produced the said check as an acquittance.

Such indorsement being claimed by the appellee to be unauthorized, this suit was brought to recover from the drawee bank as though the check had never been paid.

It is urged that it was error to allow an affidavit denying the execution of the indorsement to be filed by the appellee after the evidence was closed.

We regard the point as being more technical than meritorious. So far as the record discloses, no objection on that score, to the evidence that had been adduced on the question of the indorsement being unauthorized, was made until the evidence on both sides was closed, and was then, for the first time, urged as an objection to a finding in favor of the appellee as plaintiff.

So soon as the objection was made, the court gave leave to the appellant, as defendant, to file the affidavit, which was, we think, in apt time.

The further objection that the justice of the peace had no right to enter judgment for the plaintiff for want of an affidavit denying the execution of the indorsement, and that the superior court could not remedy an omission of that kind before the justice, is frivolous, and, if it were not, the point not being made in the superior court could not be made here for the first time.

It is next contended that there is no evidence that at the time the check was presented to appellant by the appellee for payment there were funds to the credit of the drawer sufficient to pay the check.

It being made to appear that the bank paid the check upon its presentment, after the unauthorized indorsement by Gordon & Co., and charged the amount to the account of the drawer, who then had sufficient funds on deposit to meet it, and who afterwards lifted the check in settlement with the bank, constituted sufficient proof of an acceptance of the check by the bank, in this suit brought by the payee against the bank. Jackson v. Bank, 92 Tenn. 154, 20 S. W. 892.

It is further argued that Gordon & Co. had authority to indorse the check and collect it. It might well be that, if Gordon & Co. had authority to make collections for coal they had sold for appellee, it would be immaterial whether they had express authority to indorse checks received by them in the course of making such collections; the payment to them of the check amounting, in such case, to a collection which they had authority to make, and the method or means of making such collection being something which their principal could not escape the effect of.

But the mere fact that Gordon & Co. had possession of the check affords no presumption of their authority to indorse it, nor would mere authority possessed by Gordon & Co. to accept checks from customers of appellee for coal sold give to them either express or implied authority to indorse such checks by the name of appellee. And if the drawee of such a check pays the same upon an indorsement that is not genuine, or is not authorized, it does so at its peril, and the burden of showing the authority of the stranger to the check to indorse the same for the payee, would be upon the drawee, if it would escape liability to pay it over again to the payee. Jackson v. Bank, supra.

Whether there was any express authority to Gordon & Co. to indorse and collect checks delivered to them, but made payable to the appellee, or whether from the course of dealing between appellee and Gordon & Co. such authority might be implied, were questions which the superior court decided after full hearing and consideration, and we do not feel justified in overturning the conclusion there reached, but must affirm the judgment.

METROPOLITAN NAT. BANK v. JONES et al.

(27 N. E. 533, 137 Ill. 634.)

Supreme Court of Illinois. May 13, 1891.

Appeal from appellate court, first district.

Hamline, Scott & Lord, for appellant. *Runyan & Runyan*, for appellees.

BAILEY, J. This was a suit in *assumpsit*, brought by the Metropolitan National Bank of Chicago against Noble Jones, Edward S. Jones, and Walter Metcalf, copartners doing business under the firm name of Noble Jones, to recover the amount of a bank-check for $1,540, drawn by the defendants on the Traders' Bank of Chicago, payable to the order of the plaintiff. The defendants pleaded *non assumpsit*, and on trial before the court, a jury being waived, the issues were found for the defendants, and the court, after denying the plaintiff's motion for a new trial, gave judgment in favor of the defendants for costs.

The facts appear by stipulation, and are, in substance, as follows: On the 1st day of October, 1888, after the commencement of banking hours in the morning of that day, the defendants, being indebted to the plaintiff in the sum of $1,540, gave to the plaintiff their check on the Traders' Bank of Chicago, as follows:

"Edw. S. Jones. $1,540.00. Walter Metcalf.
"Noble Jones.

"Chicago, Cook Co., Ill., Oct. 1, 1888.

"Pay to the order of Metrop. Nat'l Bank fifteen hundred and forty dollars.

"To Traders' Bank,
"Chicago, Ill.
"No. 18,128. NOBLE JONES."

On the same day, and during banking hours, the plaintiff sent said check by one of its collectors to the Traders' Bank, and asked said bank to certify it, which was done by writing across the face of it as follows: "Certified, 10, 1, 1888. Traders' Bank of Chicago. CHARLES G. FOX." The next morning, during banking hours, but before clearing-house hours, the plaintiff sent said check by its collector to the Traders' Bank, and presented it for and demanded payment, which was refused. Thereupon, on the same day, and during banking hours, the plaintiff protested said check for non-payment, and sent notice of dishonor to the defendants. On the morning said check was presented for payment, and before it was presented, and before clearing-house hours, the Traders' Bank became insolvent, and suspended payment, and its assets were subsequently placed in the hands of a receiver, who has since had possession thereof. Said receiver has paid the creditors of said bank dividends at different times, those paid to the plaintiff amounting to $633, leaving a balance, principal and interest, due on said check at the time of the trial of $961.70. At the time said check was drawn, at the time it was certified, and at the time payment was demanded, the defendants had sufficient funds in the Traders' Bank to their credit to pay the check, and, if payment had been demanded instead of certification, said bank would have paid it. Upon these facts the counsel for the plaintiff submitted to the court the following proposition, to be held as the law in the decision of the case, which was refused: "The court holds, as a proposition of law, that when the holder of a check drawn upon a bank, situated in the same city as the holder, on the day of its issue takes said check to said bank and asks said bank to certify said check, which said bank certifies by marking 'Certified' on the face thereof, and the day following, during bank hours, presents said check to said bank for payment, and the bank refuses payment thereof, having become insolvent and passed into the hands of a receiver before banking hours of said day, and the holder of said check at once, and during banking hours of said day, gives notice of such dishonor to the drawer of said check, said certification does not release the drawer of said check, although at the time of the making and certification of said check the drawer had sufficient funds to his credit in said bank to pay the same, and, if payment had been demanded by the holder instead of certification, such bank could not have refused to pay the same."

The only question presented by this appeal is the one raised by the foregoing proposition, viz., whether the plaintiff, by obtaining certification of said check, released the drawers. A check being payable immediately and on demand, the holder can only present it for payment, and the bank can fulfill its duty to its depositor only by paying the amount demanded. In other words, the holder has no right to demand from the bank anything but payment of the check, and the bank has no right, as against the drawer, to do anything else but pay it. It follows that there is no such thing as "acceptance" of checks, in the ordinary sense of the term, for "acceptance" ordinarily implies that the drawer requests the drawee to pay the amount at a future day, and the drawer "accepts" to do so, thereby becoming the principal debtor, and the drawer becoming his surety. Daniel, Neg. Inst. § 1601. If, then, the holder, on making presentment of the check, instead of demanding and receiving payment, has the check certified and retains it in his possession, he enters into a new and express contract with the bank not within the scope of the legal relations of the parties, nor within the presumed intention of the drawer. By certification, the bank enters into an absolute undertaking to pay the check when presented at any time within the period prescribed by the statute of limitations. The transaction, as between the holder and the bank, is substantially the same, in legal effect, as though the holder had received payment, and had deposited the money with the bank, and received a certificate of deposit therefor. The liability of the bank, after certification, is independent of the question of its possession of the requisite amount of funds of the drawer; it being, by the act of certification, estopped to deny the possession of sufficient funds. Another result of the transaction is that the bank thereby becomes entitled to, and if its business is

properly conducted actually does, charge the amount of the check to the account of the drawer at the time of the certification; thus in reality appropriating to the payment of the check the necessary amount of the money on deposit to the credit of the drawer, precisely the same as though the check were paid. As between the bank and drawer, certification has the same effect as payment, the funds representing the amount of the check being just as effectually withdrawn from the control of the drawer, and the indebtedness from the bank to the depositor created by the deposit being just as effectually satisfied to that amount in one case as in the other. The question whether this change in the rights and relations of the parties should be held to discharge the drawer from further liability on the check has not, so far as we are aware, ever been before this court for decision, but the great weight of authority, as found in the decisions of courts of other jurisdictions and in the treatises of law-writers of the greatest learning and ability, is in favor of the conclusion that the drawer is discharged. Mr. Daniel, in the section of his treatise above cited, lays it down as the rule that the bank, by certifying the check, becomes the principal and only debtor; that the holder, by taking a certificate of the check from the bank, instead of requiring payment, discharges the drawer; and that the check then circulates as the representative of so much cash in bank payable on demand to the holder. The question is very elaborately and learnedly discussed in 1 Morse, Bank. (3d Ed.) § 414 et seq., and the same conclusion reached, the following being a portion of the reasoning there adopted: "The drawer can no longer sue, though the bank should finally refuse to pay the check, for he has originally only a right to demand that the check shall be duly paid on presentment, and his action lies for the damage resulting to him or to his credit from not having his debt duly discharged in the manner he has led his creditor to suppose would be sufficient. But if the holder waives his right to immediate payment, by expressly asking for or even by accepting the offer of a certification by the bank, it follows that, since his act acquits the debt due him from the drawer, the drawer can thereafter have no cause or basis whatsoever on which to sue. The matter is voluntarily taken out of his hands by the other parties, who make their arrangements to suit their own convenience. Even if the drawer has suggested or requested the arrangement, the assent of the payee and holder must be regarded as at his sole risk. He is not obliged to take the bank's promise in place of the drawer's indebtedness. The promise of the bank on the drawer's account, accepted as satisfactory by the creditor, discharges the debtor, and at the same time deprives him of all further concern or possible right of action in the premises." See, also, Tied. Com. Paper, § 436. This question was before the court of appeals of New York in Bank v. Leach, 52 N. Y. 350, and it was there held that, where a holder of a check presents it and procures it to be certified by the bank instead of being paid, such certification is, as between the holder and the drawer, a payment, and discharges the drawer from liability. In discussing the grounds upon which their decision is based, the court say: "When the drawee accepts, it is an appropriation of the funds, *pro tanto*, to the service and use of the payee or other person holding the bill, so that the amount ceases henceforth to be the money of the drawer, and becomes that of the payee or other holder in the hands of the acceptor. It is entirely clear that the acceptance of a time draft, before due, does not operate as a payment as respects the drawer. Its only effect is to make the acceptor the primary party to pay the draft. But the parties to a certified check, due when certified, occupy a different position. There the money is due and payable when the check is certified. The bank virtually says that the check is good. 'We have the money of the drawer here ready to pay it. We will pay it now, if you will receive it.' The holder says: 'No; I will not take the money. You may certify the check, and retain the money for me until this check is presented.' The law will not permit a check when due to be thus presented, and the money to be left with the bank for the accommodation of the holder, without discharging the drawer. The money being due, and the check presented, it is his own fault if the holder declines to receive the pay, and for his own convenience has the money appropriated to that check, subject to its future presentment at any time within the statute of limitations." See, also, Essex County Nat. Bank v. Bank of Montreal, 7 Biss. 193.[1] It seems to us very clear, both upon principle and authority, that the plaintiff in this case, by obtaining certification of their check, discharged the defendants from all liability thereon as drawers, and that the subsequent presentment of the check for payment, though on the next business day after the check was issued, did not revive or in any manner affect the defendants' liability.

But it is said that a different rule was laid down by this court in Bickford v. Bank, 12 Ill. 238, Rounds v. Smith, Id. 245; and Brown v. Leckie, 43 Ill. 497. It will be found, on examination, that in each of those cases certification of the check was obtained by the drawer before delivery to the payee, and that no presentment was made by the holder until made in due course for payment. It is easy to see that an essentially different rule should apply in a case of that kind. The fact that the drawer, before delivering the check, gets the bank to certify it, in no way changes its essential nature as a check or affects the drawer's liability in case, on due presentation for payment, the paper is dishonored. The reasoning of the opinion in the above-mentioned cases should be restricted in its application to the facts appearing in those cases, and, as applied to those facts, it is doubtless correct, and should be followed. But it cannot, and, as we may assume, was not intended, to apply to cases like the present, where the

[1] Fed. Cas. No. 4,532.

holder has himself made presentment of the check, and, instead of receiving payment, as he might and should have done, has chosen rather to accept, in lieu of payment, an express executory agreement by the bank to pay the check to the holder when presented for payment at any time thereafter.

Much effort is made by counsel to show that, to be consistent with the doctrine established by the case of Munn v. Burch, 25 Ill. 35, and in the numerous cases in which that decision has been followed, we must hold that the defendants were not released from liability by the certification of the check. In Munn v Burch we held, contrary to the rule recognized in many of the states, that a depositor, by delivering to another his check on his banker for value, transfers to the payee of the check and his assigns so much of the deposit as the check calls for, and that on presentation of the check for payment the banker becomes liable to the holder for that amount, provided the drawer has on deposit at the time a sufficient sum applicable to that purpose to pay the check. Accordingly, if the banker refuses to pay the check on presentment, he becomes liable to an action by the holder to recover its amount. It follows that the giving of the check becomes, at least after presentment, an assignment to the holder of a sufficient amount of the deposit to pay the check, and therefore a definite appropriation of that sum to its payment binding upon all the parties to the check. The argument sought to be made, if we understand it, is that the certification of the check is a no more effectual appropriation of the fund on deposit to the payment of the check than was already made by the act of the drawer in giving the check, and therefore that one of the chief grounds upon which the rule adopted in other states, that certification releases the drawer, is based, fails or is inapplicable here. If the mere fact of such appropriation, however made, is the test by which to determine whether the drawer has been released or not, there may be force in the argument. We do not understand, however, that such is the case. Some of the authorities, it is true, allude to and dwell upon that circumstance as possessing very considerable significance, but we do not understand that any of them make it the test or basis of the rule. The rule laid down in Munn v. Burch is based upon the implied agreement on the part of the banker to pay out the money deposited to the holders of the depositor's checks, at such times and in such sums as the depositor sees fit, by his checks, to order, and such agreement is held to be so far available to the holder of the depositor's check as to enable him, after the check has been duly presented for payment and payment refused, to bring suit against the banker in his own name, and recover the amount of the check. The banker, as the result of his implied agreement, becomes the principal debtor, but the drawer is still liable, at least as surety, and is at liberty at any time, by paying and taking up the check, to reinvest himself with the legal title to the money on deposit. The appropriation of the fund, then, so far as any definite appropriation of it can, under the circumstances, be said to be made, is only conditional, and follows in strict accordance with the terms of the contract between the parties, and must be regarded as one of the consequences contemplated by them at the time the check was drawn. But where the holder of the check, on presenting it to the banker, instead of demanding and receiving payment, as the parties contemplated and as is his legal duty, requests and obtains certification, and retains the check in his own hands, wholly different rights are obtained, and consequently different rules of law are applicable. The appropriation of the deposit to the payment of the check then becomes absolute, and the holder enters into new contractual relations with the banker, not contemplated or authorized by the drawer, and which place the fund appropriated wholly beyond his control and out of his reach. Even viewing the drawer as surety, the new contract between the creditor and the principal debtor, affecting as it does the character of the debt and the time and manner of payment, should of itself be held, upon well-settled principles of law, to be sufficient to discharge his liability as surety. But, whether the decision of the case should be placed upon this ground or not, the presentment of the check for payment and its dishonor on the one hand, and its presentment and certification on the other, involve legal rights, and invoke the application of legal rules, so essentially different that the doctrine of the case of Munn v. Burch, which is controlling where payment is demanded and refused, can have no relevancy to or controlling effect, even by analogy, in a case where the holder gets the check certified. We are of the opinion that no error was committed in refusing to hold the proposition submitted by the plaintiff as the law in the decision of the case, and that the appellate court properly affirmed the judgment. The judgment of the appellate court will accordingly be affirmed.

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